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JSN  
JAH  
BRF

v.2





# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

## HIGH COURT OF CHANCERY,

*11 Brit*

DURING THE TIME OF

LORD CHANCELLOR COTTENHAM

AND

THE LORDS COMMISSIONERS.

BY

FREDERICK JAMES HALL & PHILIP TWELLS, Esqrs.,

BARRISTERS-AT-LAW.

...

VOL. II.

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LORD COTTENHAM, *Lord High Chancellor.*

LORD LANGDALE . . .	}	<i>Lords Commissioners.</i>
SIR LANCELOT SHADWELL .		
SIR ROBERT MONSEY ROLFE		

LORD LANGDALE, *Master of the Rolls.*

SIR LANCELOT SHADWELL, *Vice-Chancellor of England.*

SIR JAMES LEWIS KNIGHT BRUCE	}	<i>Vice-Chancellors.</i>
SIR JAMES WIGRAM . . .		

SIR JOHN JEEVIS, *Attorney-General.*

SIR JOHN ROMILLY, *Solicitor-General.*

## MEMORANDA.

---

At the end of Trinity Term, 1850, Lord *Cottenham* resigned the Great Seal, which was thereupon put into Commission. The Commissioners were Lord *Langdale*, the Master of the Rolls; Sir *Lancelot Shadwell*, Vice-Chancellor of *England*; and Sir *Robert Monsey Rolfe*, one of the Barons of the Court of Exchequer: and they first took their seats as *Lords Commissioners* on the 20th of June, 1850.

In Trinity Vacation, 1850, Sir *Thomas Wilde*, Lord Chief Justice of the Court of Common Pleas, was appointed *Lord Chancellor*, and was created *Baron Truro*. He first took his seat as *Lord Chancellor* on the 17th of July, 1850.

Sir *John Jervis*, her Majesty's Attorney-General, succeeded Lord *Truro*, as Chief Justice of the Common Pleas; and was succeeded as Attorney-General by Sir *John Romilly*.

*Alexander James Edward Cockburn*, Esq., was appointed *Solicitor-General* in the place of Sir *John Romilly*; and, shortly afterwards, received the honor of Knighthood.

Sir *Lancelot Shadwell*, Vice-Chancellor of *England*, died in July, 1850; and shortly afterwards, Sir *James Wigram*, Vice-Chancellor, resigned his office.

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## ORDERS IN CHANCERY.

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### ORDER OF COURT.

*Monday, the 22nd day of April, 1850.*

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, DOTH HEREBY, in pursuance of an Act of Parliament passed in the fourth year of the reign of Her present Majesty, <sup>4 Vict. c. 94.</sup> intituled "An Act for facilitating the Administration of Justice in the Court of Chancery," and of an Act passed in the fifth year of the reign of Her present Majesty, intituled "An Act to amend an Act <sup>5 Vict. c. 52.</sup> of the Fourth Year of the Reign of Her present Majesty, intituled 'An Act for facilitating the Administration of Justice in the Court of Chancery,' " and of an Act passed in the eighth and ninth years of the reign of Her present Majesty, intituled "An Act

8 & 9 Vict.  
c. 105.

for amending certain Acts of the Fourth and Fifth Years of the Reign of Her Majesty, for facilitating the Administration of Justice in the Court of Chancery, and for providing for the Discharge of the Duties of the Subpœna Office after the Death, Resignation, or removal of the present Patentee of that Office," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT, That all and every the Rules, Orders, and Directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be GENERAL ORDERS AND RULES OF THE HIGH COURT OF CHANCERY; viz.

Parties who may commence proceedings in Chancery, by filing a claim instead of a bill.

I. Any person seeking equitable relief may, without special leave of the Court, and instead of proceeding by bill of complaint in the usual form, file a claim in the Record and Writ Clerks Office, in any of the following cases; that is to say, in any case where the Plaintiff is or claims to be,

Creditor of deceased.

1. A creditor upon the estate of any deceased person, seeking payment of his debt out of the deceased's personal assets.

Legatee.

2. A legatee under the will of any deceased person, seeking payment or delivery of his legacy out of the deceased's personal assets.

Residuary legatee.

3. A residuary legatee or one of the residuary legatees of any deceased person, seeking an account of the residue, and payment or appropriation of his share therein.

Next of kin.

4. The person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate and payment of his share thereof.

Executor or administrator.

5. An executor or administrator of any deceased person, seeking to have the personal estate of such deceased person administered under the directions of the Court.

Mortgagee.

6. A legal or equitable mortgagee or person entitled to a lien as security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.

- |   |   |
|---|---|
| 7. A person entitled to redeem any legal or equitable mortgage or any lien, seeking to redeem the same.   | Mortgagor.  |
| 8. A person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance.   | Vendor or purchaser.                                      |
| 9. A person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.  | Partner.  |
| 10. A person entitled to an equitable estate or interest, and seeking to use the name of his trustee in prosecuting an action for his own sole benefit.   | <i>Cestui que trust</i> , seeking to use name of trustee. |
| 11. A person entitled to have a new trustee appointed, in a case where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee. | Party entitled to have new trustee appointed.             |

II. Such claim in the several cases enumerated in Order I. is to be in the form and to the effect set forth in Schedule A. hereunder written, as applicable to the particular case, and the filing of such claim is, in all cases not otherwise provided for, to have the force and effect of filing a bill.

III. Every such claim is to be marked, at or near the top or upper part thereof, in the same manner as a bill is now marked, with the name of the Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls.

IV. Upon filing such claim, the Plaintiff thereby claiming may sue out a writ of summons against the Defendant to the claim, requiring him to cause an appearance to be entered to such writ, and also requiring him, on a day or time to be therein named, or on the seal or motion day then next following, to shew cause, if he can, why such relief as is claimed by the Plaintiff should not be had, or why such order as shall be just, with reference to the claim, should not be made.

V. Such writ of summons is to be in the form and to the

effect in that behalf set forth in No. 1 of Schedule B. hereunder written, with such variations as circumstances may require, and is to be sealed with the seal of the office of the Clerks of Records and Writs.

In cases not enumerated claim may be filed by special leave of Court.

VI. In any case, other than those enumerated in Order I., or in any case to which the Forms set forth in Schedule A. are not applicable, the Court (if it shall so think fit) may, upon the *ex parte* application of any person seeking equitable relief, and upon reading the claim proposed to be filed, give leave to file such claim and sue out a writ of summons thereon under these Orders; and if such leave be given, an endorsement thereon by the Registrar upon the proposed claim shall be a sufficient authority for the Record and Writ Clerk to receive and file such claim.

What parties are necessary as Defendants, where executor or administrator is Plaintiff.

VII. In the case provided for by the 5th Article of Order I., any one person, who, under the 3rd or 4th Article of Order I., might have claimed relief against the executor or administrator of the deceased person whose personal estate is sought to be administered, and the co-executor or co-administrator (if any) of the Plaintiff, may be named in the writ of summons as Defendants to the suit; and, in the first instance, no other person need be therein named.

The person against whom direct relief claimed is the only party who need be made Defendant.

VIII. In other cases, the only person who need be named in the writ of summons as Defendant to the suit, in the first instance, is the person against whom the relief is directly claimed.

All claims and proceedings to be subject to the General Rules, Orders, and practice: and orders as to be enforced as if made upon bill filed.

IX. All claims, and all writs, caveats, proceedings, directions, and orders consequent thereon, either before the Court, or in the Masters' offices, are to be deemed proceedings, writs, and orders subject to the General Rules, Orders, and practice of the Court, so far as the same are or may be applicable to each particular case and consistent with

these Orders; and all orders of the Court, made in such proceedings, are to be enforced in the same manner and by the same process, as orders of the Court made in a cause upon bill filed.

X. Writs of summons are, as to the number of Defendants to be named therein, as to the mode of service thereof, and as to the time and mode of entering appearances thereto, to be subject to the same rules as writs of *subpœna* to appear to and answer bills.

Writs of summons to be subject to same rules as writs of *subpœna*.

XI. The time for shewing cause named in any writ of summons (except a writ of summons to revive or carry on proceedings) is to be fourteen days at the least after service of the writ; but, by consent of the parties, and with the leave of the Court, cause may be shewn on any earlier day.

Time named in writ, for shewing cause, to be fourteen days after service:

XII. At the time for shewing cause named in the writ, or on the seal or motion day then next following, or so soon after as the case can be heard, the Defendant, having previously appeared, is personally or by Counsel to shew cause in Court, if he can (and if necessary by affidavit) why such relief as is claimed by the claim should not be had against him.

when Defendant is to shew cause why such relief as is claimed should not be had.

XIII. At the time appointed for shewing cause, upon the motion of the Plaintiff, and on hearing the claim, and what may be alleged on the part of the Defendant, or upon reading a certificate of the appearance being entered by the Defendant, or an affidavit of the writ of summons being duly served, the Court may, if it shall think fit, make an order granting or refusing the relief claimed, or directing any accounts or inquiries to be taken or made, or other proceedings to be had, for the purpose of ascertaining the Plaintiff's title to the relief claimed; and further, the Court may direct such (if any) persons or classes of persons as it

Court may then grant or refuse relief;

or direct accounts or inquiries;

and may direct

any other persons to be summoned as parties.

shall think necessary or fit to be summoned or ordered to appear as parties to the claim, or on any proceedings before the Master, with reference to any accounts or inquiries directed to be taken or made, or otherwise.

Order to have the effect of and to be enforced as a decree.

XIV. Every order to be so made is to have the effect of and may be enforced as a decree or decretal order made in a suit commenced by bill, and duly prosecuted to a hearing according to the present course of the Court.

Court may direct bill to be filed.

XV. If, upon the application for any such order, or during any proceedings under any such order when made, it shall appear to the Court that, for the purposes of justice between the parties, it is necessary or expedient that a bill should be filed, the Court may direct or authorise such bill to be filed, subject to such terms as to costs or otherwise as may be thought proper.

Forms of orders.

XVI. The orders made for granting relief, in the several cases to which the Forms set forth in Schedule A. are applicable, may, if the Court thinks fit, be in the form and to the effect set forth in Schedule C. as applicable to the particular case, with such variations as circumstances may require.

Authority of Master, under these Orders, as to examinations, production of documents, taking accounts, &c.

XVII. Under every order of reference to the Master under these Orders, the Master is, unless the Court otherwise orders, to be at liberty to cause the parties to be examined on interrogatories, and to produce deeds, books, papers, and writings, as he shall think fit; and to cause advertisements for creditors, and if he shall think it necessary, but not otherwise, for heirs, and next of kin, or other unascertained persons, and the representatives of such as may be dead, to be published in the usual forms, or otherwise, as the circumstances of the case may require; and, in such advertisements to appoint a time within

which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded the benefit of the order; and in taking any account of a deceased's personal estate, under any such order of reference, the Master is to inquire and state to the Court what part, if any, of the deceased's personal estate is outstanding or undisposed of, and is also to compute interest on the deceased's debts, as to such of them as carry interest, after the rate they respectively carry, and as to all others, after the rate of 4 per cent. per annum from the date of the order, and to compute interest on legacies, after the rate of 4 per cent. per annum, from the end of one year after the deceased's death, unless any other time of payment or rate of interest is directed by the will, but in that case according to the will; and under every order whereby any property is ordered to be sold with the approbation of the Master, the same is to be sold to the best purchaser that can be got for the same, to be allowed by the Master, wherein all proper parties are to join as the Master shall direct.

XVIII. If, upon the proceedings before the Master under any such order, it shall appear to the Master, that some persons, not already parties, ought to attend or to be enabled to attend the proceedings before him, he is to be at liberty to certify the same; and upon the production of such certificate to the Record and Writ Clerk, the Plaintiff may sue out a writ of summons, requiring the persons named in such certificate to appear to the writ, and such persons are thereupon to be named and treated as Defendants to the suit.

Master may certify that other persons are necessary parties as Defendants; who may thereupon be summoned.

XIX. Such writ of summons under an order or Master's certificate, is to be in the form and to the effect in that behalf set forth in No. 2 of Schedule B, with such variations as circumstances may require.

Form of such writ of summons.



Such persons may attend before Master, and must have notice of proceedings.

XX. The persons so summoned having appeared, are to be at liberty to attend, and to be entitled to notice of the proceedings before the Master under the order of reference, subject to such directions as the Master may make in respect thereof.

Where proceedings have abated, claim to revive may be filed:

XXI. Where any proceedings originally commenced by claim and writ of summons shall, by the death of parties or otherwise, have become abated or defective for want of parties, and no new relief is sought, a claim to revive or carry on the suit may be filed; and such claim is to be in the form set forth in No. 12 of Schedule A.

and writ of summons to revive sued out.

XXII. The party claiming simply to revive or carry on proceedings may sue out a writ of summons requiring the Defendant thereto to appear to the writ, and to shew cause, if he can, why the proceedings should not be revived or carried on.

Form of such writ.

XXIII. Such writ of summons is to be in the form and to the effect in that behalf set forth in No. 3 of Schedule B, with such variations as circumstances may require.

Defendant may file caveat against revivor;

XXIV. If any Defendant to any such writ is desirous of shewing cause why the proceedings should not be revived or carried on, he is to appear and to file a caveat against such revivor or carrying on, in the Record and Writ Clerks Office, in the Form set forth in No. 4 of Schedule B, and to give notice thereof in writing to the opposite party. If no such caveat be filed within eight days from the time limited for his appearance to the writ, then, at the expiration of such eight days, the proceedings are to be revived, and may be carried on without any order for the purpose; and a certificate of the Record and Writ Clerk that no caveat has been filed within the time limited, is to be a sufficient authority for the Master to proceed.

if no caveat, proceedings to be revived in eight days.

But if any such caveat be filed, the proceedings are not to be revived or carried on without an order to be obtained on motion, of which due notice is to be given.

If caveat filed, an order to revive must be obtained.

XXV. Where any further or supplemental relief is sought, and such supplemental relief is such as is provided for in any of the cases enumerated under Order I., a supplemental claim may be filed, in such of the Forms set forth in Schedule A. as is applicable to the case.

A supplemental claim may be filed;

XXVI. If such supplemental relief is not such as is provided for by Order XXV., a supplemental claim may be filed, stating shortly the nature of the Plaintiff's case, and the supplemental relief claimed, but the leave of the Court is to be obtained previously to the filing thereof, upon an *ex parte* application for the purpose, in the manner specified in Order VI.

But, in special cases, leave of Court must be previously obtained.

XXVII. A writ of summons may be sued out and other proceedings may be taken upon a supplemental claim, in like manner as upon an original claim.

Summons, &c. on supplemental claim, as upon original claim.

XXVIII. Guardians *ad litem* to defend may be appointed for infants or persons of weak or unsound mind, against whom any writ of summons may have issued under these Orders, in like manner as guardians *ad litem* to answer and defend are now appointed in suits on bill filed.

Guardian *ad litem*, as when bill filed.

XXIX. Any order or proceeding made or purporting to be made in pursuance of these Orders may be discharged, varied, or set aside on motion; and any order for accelerating proceedings may be made by consent.

Orders may be discharged &c. on motion.

XXX. Any order of the Master of the Rolls or of any of the Vice-Chancellors may be discharged or varied by the Lord Chancellor on motion.

Orders of M. R. or any V.-C. may be discharged by L. C. on motion.

In special cases, Plaintiff may proceed by bill, as if these Orders had not been made.

XXXI. If any of the cases enumerated in Order I. involve or are attended by such special circumstances, affecting either the estate or the personal conduct of the Defendant, as to require special relief, the Plaintiff is at liberty to seek his relief by bill, as if these Orders had not been made.

Extra costs of proceeding by bill instead of by summons, may be thrown upon Plaintiff.

XXXII. If, at any time after these Orders come into operation, any suit for any of the purposes to which the Forms set forth in Schedule A. are applicable, shall be commenced by bill and prosecuted to a hearing in the usual course, and upon the hearing, it shall appear to the Court that an order to the effect of the decree then made, or an order equally beneficial to the Plaintiff, might have been obtained upon a proceeding by summons, in the manner authorised by these Orders, the Court may order that the increased costs which have been occasioned by the proceeding by bill, beyond the amount of costs which would have been sustained in the proceeding by summons, shall be borne and paid by the Plaintiff.

Fees:  
to Record and  
Writ Clerks;

XXXIII. The Record and Writ Clerks are directed to take the following fees:—

	£	s.	d.
1. For filing a claim . . . . .	0	5	0
2. For sealing every writ of summons . . . . .	0	5	0
3. For filing a caveat . . . . .	0	2	6

For appearances, office copies, certificates, &c., the same fees as directed by the Schedules of fees now in force.

to Registrars;

The Registrars are directed to take the following fees:—

	£	s.	d.
1. For every order on the hearing of a claim, and on further directions . . . . .	2	0	0
2. For every office copy thereof . . . . .	0	10	0
3. For every order on arguing exceptions . . . . .	1	0	0
4. For every office copy thereof . . . . .	0	5	0

5. For every order for transfer out of Court, or sale of any sum of Government Stock, &c., exceeding 100*l.* stock or annuities, and for every order for payment out of Court of any annuity or annuities, or of any interest or dividends upon stock or annuities, exceeding in the whole 5*l.* per annum . . . . . 1 10 0
6. For every office copy thereof . . . . . 0 10 0

For every other order and office copy, the same fees as now received by the Registrars and their clerks under the Schedules of fees now in force.

Solicitors are entitled to charge and be allowed the following fees:—

	£	s.	d.
For instructions to sue or defend . . . . .	0	6	8
For instructions for every claim . . . . .	0	13	4
For preparing and filing a claim . . . . .	2	2	0
For preparing a writ of summons . . . . .	0	13	4
For each writ after the first . . . . .	0	6	8
For engrossing claims and writs, per folio . . . . .	0	0	6
For parchment: As paid			
For each copy of writ to serve, per folio . . . . .	0	0	4
For the brief to Counsel to move for leave to file claim, (exclusive of a copy of the claim for Counsel and the Court) . . . . .	0	10	0
For the brief and instructions to Counsel on the hearing, (exclusive of any necessary copies) . . . . .	1	0	0

For taking instructions to appear and for entering appearance:—

For one or more Defendants, if not exceeding three . . . . .	0	13	4
If exceeding three, and not more than six, an additional sum of . . . . .	0	6	8
If exceeding six, for every number not exceeding three, an additional sum of . . . . .	0	6	8
For settling minutes, passing and entering order on hearing.—The same charges as on a decretal order.			
For entering a caveat . . . . .	0	6	8
For procuring certificate of no caveat . . . . .	0	6	8
For term fee.—As in a suit.			

And also all such fees as, by the present practice of the Court, they are entitled to, save such as are varied or rendered unnecessary by these present Orders.

Orders to come  
into operation  
22nd May,  
1850.

XXXIV. These Orders shall come into operation on the 22nd day of May, 1850.

Interpretation  
Order.

XXXV. In these Orders and the Schedules, the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction; viz.

- |                    |  |
|--------------------|--|
| Number.            | 1. Words importing the singular number include the plural number, and words importing the plural number include the singular number: |
| Gender.            | 2. Words importing the masculine gender include females:   |
| Affidavit.         | 3. The word "affidavit" includes "affirmation" and "declaration on honour:"  |
| Person.            | 4. The word "person" or "party" includes a body politic or corporate:  |
| Legacy.            | 5. The word "legacy" includes "an annuity" and a specific as well as a pecuniary legacy:   |
| Legatee.           | 6. The word "legatee" includes "a person interested in a legacy:"  |
| Residuary legatee. | 7. The expression "residuary legatee" includes "a person interested in the residue."   |

## SCHEDULE A.

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*Forms of Claim.*

1. *By a Creditor upon the Estate of a Deceased Person, seeking Payment of his Debt out of the Deceased's Personal Assets.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

Between *A. B.*, Plaintiff.  
*E. F.*, Defendant.

The claim of *A. B.*, of ———, the above-named Plaintiff. The said *A. B.* states, that *C. D.*, late of ———, deceased, was, at the time of his death, and that his estate still is, justly indebted to him the said *A. B.*, in the sum of £———, for goods sold and delivered by the said *A. B.* to the said *C. D.* [*or otherwise, as the case may be, or, if the debt is secured by any written instrument, state the date and nature thereof.*] And that the said *C. D.* died in or about the month of ———, and that the above-named Defendant *E. F.* is the executor [*or, administrator*] of the said *C. D.*, and that the said debt hath not been paid; and therefore the said *A. B.* claims to be paid the said debt or sum of £———, with his costs of this suit, and in default thereof, he claims to have the personal estate of the said *C. D.* administered in this Court, on behalf of himself and all other the unsatisfied creditors of the said *C. D.*,

and for that purpose, that all proper directions may be given and accounts taken.

*NOTE.—This Form may be varied according to the circumstances of the case, where the claimant is not the original creditor, but has become interested in or entitled to the debt; in which case the character in which he claims is to be stated.*

- 
2. *By a Legatee under the Will of any Deceased Person, seeking Payment or Delivery of his Legacy, out of the Testator's Personal Assets.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

Between *A. B.*, Plaintiff.  
*C. D.*, Defendant.

The claim of *A. B.*, of ———, the above-named Plaintiff. The said *A. B.* states, that he is a legatee to the amount of £———, under the will dated the ——— day of ———, of ———, late of ———, deceased, who died on the ——— day of ———, and that the above-named *C. D.* is the executor of the said ———, and that the said legacy of £———, together with interest thereon after the rate of £——— per cent. per annum from the ——— day of ———, [*the day mentioned in the will for the payment of the legacy, or the expiration of twelve calendar months after the said testator's death,*] is now due and owing to him the said *A. B.* [*or, still unpaid or unsatisfied*] [*or, unappropriated or unsecured.*] And the said *A. B.* therefore claims to be paid [*or, satisfied*] the said

legacy and interest, [or, to have the said legacy and interest appropriated and secured,] and in default thereof, he claims to have the personal estate of the said ——— administered in this Court, on behalf of himself and all other the legatees of the said ———, and for that purpose, that all proper directions may be given and accounts taken.

*NOTE.—This Form may be varied according to the circumstances of the case, where the legacy is an annuity or specific, or where the Plaintiff is not the legatee, but has become entitled to or interested in the legacy; in which case, the character in which the Plaintiff claims is to be stated.*

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**3. By a Residuary Legatee, or any of several Residuary Legatees of any Deceased Person, seeking an Account of the Residue, and Payment or Appropriation of his Share therein.**

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (naming him).]  
or,  
[Master of the Rolls.]

Between *A. B.*, Plaintiff.  
*C. D.*, Defendant.

The claim of *A. B.*, of ———, the above-named Plaintiff. The said *A. B.* states, that he is the residuary legatee, [or, one of the residuary legatees] under the will dated the ——— day of ———, of ———, late of ———, who died on the ——— day of ———, and that the above-named Defendant *C. D.* is the executor of the said ———, and that the said *C. D.* hath not paid to the said *A. B.* the [or, his share of the] residuary personal estate of the said tes-



tator. The said *A. B.* therefore claims to have the personal estate of the said ——— administered in this Court, and to have his costs of this suit, and for that purpose, that all proper directions may be given and accounts taken.

*NOTE.—This Form may be varied according to the circumstances of the case, where the Plaintiff is not the residuary legatee, but has become entitled to or interested in the residue, in which case, the character in which he claims is to be stated.*

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4. *By the Person, or any of the Persons, entitled to the Personal Estate of any Person who may have died intestate, and seeking an Account of such Personal Estate and Payment of his Share thereof.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

Between *A. B.*, Plaintiff.  
*C. D.*, Defendant.

The claim of *A. B.*, of ———, the above-named Plaintiff. The said *A. B.* states, that he is the next of kin [*or, one of the next of kin,*] according to the Statutes for the distribution of the personal estate of intestates, of ———, late of ———, who died on the ——— day of ———, intestate; and that the said *A. B.* is entitled to [*or, to a share of*] the personal estate of the said ———, deceased, and that the said Defendant *C. D.* is the administrator of the personal estate of the said ———; and that the said *C. D.* has not accounted for or paid to the said *A. B.* the

[or, the said *A. B.*'s share of the] personal estate of the said intestate. The said *A. B.* therefore claims to have the personal estate of the said ——— administered in this Court, and to have his costs of this suit; and for that purpose, that all proper directions may be given and accounts taken.

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5. *By the Executor or Administrator of a Deceased Person, claiming to have the Personal Estate of the Testator administered under the Direction of the Court.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]

or,

[Master of the Rolls.]

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

The claim of *A. B.*, of ———. The said *A. B.* states, that he is the executor [*or, administrator*] of *E. F.*, late of ———, but now deceased, who departed this life on or about ———, and that he hath possessed the personal estate of the said *E. F.* to some amount, and that he is willing and desirous to account for the same, and that the whole of the personal estate of the said *E. F.* should be duly administered in this Court, for the benefit of all persons interested therein or entitled thereto; and that *C. D.* is interested in the said personal estate as one of the next of kin [*or, residuary legatee*] of the said *E. F.* And the said *A. B.* claims to have the personal estate of the said *E. F.* applied in a due course of administration, under the direction of this Court, and in the presence of the said *C. D.* and such other persons interested in the said estate as this Court may be pleased to direct, or that the said *C. D.* may shew good cause to the contrary: And that the

[This form may be varied according to circumstances when the Plaintiff's co-executor or co-administrator is a Defendant.]

costs of this suit may be provided for; and for these purposes, that all proper directions may be given and accounts taken.

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6. *By a Legal or Equitable Mortgagee or Person entitled to a Lien as Security for a Debt, seeking Foreclosure or Sale, or otherwise to enforce his Security.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]

or,

[Master of the Rolls.]

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

[The names only of the parties are to be set out, not the substance or effect of the document.]

[If there is no written security to be referred to, the property is to be described generally.]

The claim of *A. B.*, of ———, the above-named Plaintiff. The said *A. B.* states, that under or by virtue of an indenture [*or other document*,] dated the ——— day of ———, and made between [*parties*,] [and a transfer thereof made by indenture dated the ——— day of ———, and made between [*parties*,] the said *A. B.* is a mortgagee [*or*, an equitable mortgagee] of [*or*, is entitled to a lien upon] certain freehold property [*or*, copyhold, *or*, leasehold, *or other property, as the case may be*,] therein comprised, for securing the sum of ——— pounds and interest, and that the time for payment thereof has elapsed; and that the above-named *C. D.* is entitled to the equity of redemption of the said mortgaged premises [*or*, the premises subject to such lien.] And the said *A. B.* therefore claims to be paid the said sum of ——— pounds and interest, and the costs of this suit, and in default thereof, he claims to foreclose the equity of redemption of the said mortgaged premises [*or*, to have the said mortgaged premises sold, *or*, to have the premises subject to such lien sold, *as the case may be*,] and the pro-

duce thereof applied in or towards payment of his said debt and costs; and for that purpose to have all proper directions given and accounts taken.

---

*7. By a Person entitled to the Redemption of any Legal or Equitable Mortgage or any Lien, seeking to redeem the same.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

The claim of *A. B.*, of ———, the above-named Plaintiff. The said *A. B.* states, that under or by virtue of an indenture [*or other document*,] dated the ——— day of ———, and made between [*parties*,] [and the assurances hereinafter mentioned, that is to say, an indenture dated the ——— day of ———, the will of ———, dated the ——— day of ———,] the said *A. B.* is entitled to the equity of redemption of certain freehold property [*or, copyhold, or, leasehold, or other property, as the case may be*,] therein comprised, which was originally mortgaged [*or, pledged*] for securing the sum of ——— pounds and interest; and that the above-named Defendant *C. D.* is now, by virtue of the said indenture, dated the ——— day of ———, [and of subsequent assurances,] the mortgagee of the said property [*or, holder of the said lien*,] and entitled to the principal money and interest remaining due upon the said mortgage [*or, lien*]; and he believes that the amount of principal money and interest now due upon the said mortgage [*or, lien*] is the sum of ———

pounds, or thereabouts; and that the said *A. B.* hath made or caused to be made an application to the said *C. D.* to receive the said sum of ——— pounds, and any costs justly payable to him, and to re-convey to the said *A. B.* the said mortgaged property [*or*, property subject to the said lien,] upon payment thereof, and of any costs due to him in respect of the said security, but that the said *C. D.* has not so done. And therefore the said *A. B.* claims to be entitled to redeem the said mortgaged property [*or*, property subject to the said lien,] and to have the same re-conveyed [*or*, delivered up] to him, upon payment of the principal money and interest and costs due and owing upon the said mortgage [*or*, lien;] and for that purpose to have all proper directions given and accounts taken.

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8. *By a Person entitled to the Specific Performance of an Agreement for the Sale or Purchase of any Property, seeking such Specific Performance.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
*or*, Vice-Chancellor ———, (*naming him.*)]  
*or*,  
[Master of the Rolls.]

Between *A. B.*, Plaintiff.  
*C. D.*, Defendant.

The claim of *A. B.* of ——— the above-named Plaintiff. The said *A. B.* states, that by an agreement dated the ——— day of ———, and signed by the above-named Defendant *C. D.*, he, the said *C. D.*, contracted to buy of him [*or*, to sell to him] certain freehold property [*or*, copyhold, leasehold, *or other property, as the case may be*] therein described or referred to, for the sum of ——— pounds; and that he has made or caused to be made an application to the said

*C. D.* specifically to perform the said agreement on his part, but that he has not done so. And the said *A. B.* therefore claims to be entitled to a specific performance of the said agreement, and to have his costs of this suit; and for that purpose to have all proper directions given. And he hereby offers specifically to perform the same on his part.

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9. *By a Person entitled to an Account of the Dealings and Transactions of a Partnership dissolved or expired, seeking such Account.*

In Chancery.

[Lord Chancellor,

Vice-Chancellor of England,

or, Vice-Chancellor ———, (*naming him*).]

or,

[Master of the Rolls.]

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

The claim of *A. B.* of ——— the above-named Plaintiff. The said *A. B.* states, that from the ——— day of ——— down to the ——— day of ———, he and the above-named *C. D.* carried on the business of ——— in copartnership, under certain articles of copartnership dated the ——— day of ———, and made between [*parties*] [*or, without articles, as the case may be;*] and he saith that the said partnership was dissolved [*or, expired, as the case may be,*] on the ——— day of ———. And he claims an account of the partnership dealings and transactions between him and the said *C. D.*, and to have the affairs and business of the said partnership wound up and settled under the direction of this Court; and for that purpose that all proper directions may be given and accounts taken.

10. *By a Person entitled to an Equitable Estate or Interest, and claiming to use the Name of his Trustee in prosecuting an Action for his own sole Benefit.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

Between *A. B.*, Plaintiff.  
*C. D.*, Defendant.

The claim of *A. B.* of ———, the above-named Plaintiff. The said *A. B.* states, that, under an indenture dated the ——— day of ———, and made between [*parties*,] he is entitled to an equitable estate or interest in certain property therein described or referred to, and that the above-named Defendant is a trustee for him of such property, and that, being desirous to prosecute an action at law against ——— in respect of such property, he has made, or caused to be made, an application to the said Defendant, to allow him to bring such action in his name, and has offered to indemnify him against the costs of such action, but that the said Defendant has refused or neglected to allow his name to be used for that purpose. And the said *A. B.* therefore claims to be allowed to prosecute the said action in the name of the said Defendant, and hereby offers to indemnify him against the costs of such action.

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11. *By a Person entitled to have a New Trustee appointed, in a case where there is no Power in the Instrument creating the Trust to appoint New Trustees, or when the Power cannot be exercised, and seeking to appoint a New Trustee.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

The claim of *A. B.* of ———, the above-named Plaintiff. The said *A. B.* states, that, under an indenture dated the ——— day of ———, and made between [*parties*] [*or, will of ———, or other document, as the case may be,*] he the said *A. B.* is interested in certain trust property therein mentioned or referred to, and that the above-named Defendant *C. D.* is the present trustee of such property [*or, is the real or personal representative of the last surviving trustee of such property, as the case may be;*] and that there is no power in the said indenture [*or, will, or other document*] to appoint new trustees [*or, that the power in the said indenture [or other document] to appoint new trustees cannot be executed.*] And the said *A. B.* therefore claims to have new trustees appointed of the said trust property, in the place of [*or, to act in conjunction with*] the said *C. D.*

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12. *By a Party entitled to revive or to carry on a Suit, and seeking to revive or carry on the Suit.*

In Chancery.

<i>As in original claim.</i>	{	[Lord Chancellor, Vice-Chancellor of England, or, Vice-Chancellor ———, ( <i>naming him</i> ).]
		or,
		[Master of the Rolls.]
		Between <i>A. B.</i> , Plaintiff, & <i>C. D.</i> , Defendant, and <i>Title of this claim.</i> Between <i>G. H.</i> , Plaintiff, & <i>K. L.</i> , Defendant.

The claim of *G. H.* of ———, the above-named Plaintiff. The said *G. H.* states, that the said *A. B.* filed his claim in this suit, on or about ———; that on or about ——— the said *A. B.* died [*or*, became bankrupt, *or*, insolvent;] that the said suit, and all proceedings thereunder, have thereby become abated [*or*, defective;] that the said *G. H.* has become and is the executor [*or*, administrator, *or*, the assignee of the estate and effects] of the said *A. B.*, and he claims to be entitled to revive the said suit and proceedings, [*or*, to be entitled to carry on the said suit and proceedings,] and to have all such relief as the said *A. B.* would have been entitled to if he had lived, [*or*, had not become bankrupt, *or*, insolvent;] or that the said *C. D.* ought to shew good cause to the contrary.

NOTE.—*This Form may be applied to any case to which Order XXI. applies, and may be varied according to the circumstances of each case.*

## SCHEDULE B. (No. 1.)

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*Form of Writ of Summons on Claim.*

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to *C. D.* greeting: Whereas *A. B.* hath caused to be filed with the Record and Writ Clerks of Our High Court of Chancery, a claim as follows [*claim to be set forth verbatim;*] therefore We command you [and every of you, *where there is more than one Defendant,*] that within eight days after the service of this writ on you, exclusive of the day of such service, laying all excuses and other matters aside, you do cause an appearance to this writ to be entered for you in Our High Court of Chancery; and further, that on the fourteenth day after the service of this writ, or on the seal or motion day then next following, you do, personally or by your Counsel, appear in the Court of Our Lord Chancellor, before the Vice-Chancellor of England [*or, the Vice-Chancellor ——— (naming him),*] [*or, in the Court of Our Master of the Rolls,*] at ten of the clock in the forenoon, and then and there shew cause, if you can, why the said *A. B.* should not have such relief against you as is claimed by the said claim, or why such order as shall be just, with reference to the claim, should not be made; and hereof fail not at your peril. Witness Ourselves at Westminster the ——— day of ——— in the ——— year of Our reign.

[*The following Memorandum to be placed at the foot.*]

Appearance to be entered at the Record and Writ Clerks Office in Chancery Lane, London; and if you neglect to enter your appearance, and, either personally or by your Counsel, to appear in the High Court of Chancery, at the place and on the day and hour above mentioned, you will

be subject to such order as the Court may think fit to make against you in your absence, for payment or satisfaction of the said claim, or as the nature and circumstances of the case may require.

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SCHEDULE B. (No. 2.)

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VICTORIA, &c., to ——— greeting.

Whereas *A. B.* hath caused to be filed a claim against (*D.*) claiming &c. [*set forth only the claim, without the introductory statement.*] And whereas, by an order made in the said cause, dated the ——— day of ———, it was ordered,

And whereas Mr. ———, the Master to whom the said order stands referred, hath, by his certificate dated the ——— day of ———, certified to us, that you ought to be a party to the said cause, and to be served with a writ of summons therein; therefore We command you, that, within eight days after service of this writ on you, exclusive of the day of such service, you do cause an appearance to be entered for you in Our High Court of Chancery, and that you do attend the proceedings in the said cause as a party Defendant thereto, and do and observe such things as are by Our said Court ordered and directed in the said cause: and herein fail not. Witness, &c.

[*The following Memorandum to be placed at the foot.*]

Appearance to be entered at the Record and Writ Clerks Office, Chancery Lane, London; and, if you neglect to appear, the proceedings will be carried on without further notice to you.

SCHEDULE B. (No. 3.)

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VICTORIA, &c., to ———, greeting.

Whereas *A. B.* hath caused to be filed a claim against *C. D.*, claiming &c., [*set forth the claim verbatim.*]

And whereas the said *A. B.* hath departed this life, [*or, become bankrupt, or as the case may be,*] whereby the said suit hath become abated [*or, defective,*] and *G. H.* is now the legal personal representative [*or, assignee*] of the said *A. B.*, and, as such, claims to be entitled to revive [*or, carry on*] the said suit; therefore We command you, the said *C. D.*, that, within eight days after the service of this writ on you, exclusive of the day of such service, you do cause an appearance to be entered for you in Our High Court of Chancery, and further, that, within sixteen days after such service, you do shew good cause, if you can, why the suit and all proceedings thereunder, should not be revived against you, and be in the same plight and condition as the same were in at the time of the said abatement thereof [*or, why the suit and proceedings should not be carried on against you as claimed.*] Witness, &c.

[*The following Memorandum to be placed at the foot.*]

Appearance to be entered at the Record and Writ Clerks Office in Chancery Lane, London; and, if you desire to shew cause, you are to enter a caveat at the same office within the time limited, otherwise, the suit will stand revived [*or may be carried on,*] without further notice.

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## SCHEDULE B. (No. 4.)

*Form of Caveat against Revivor.*Between *A. B.*, Plaintiff.*C. D.*, Defendant.And between *G. H.*, Plaintiff.*K. L.*, Defendant.

The said *K. L.* objects to the suit in the Plaintiff's claim mentioned being revived [*or*, carried on] against him in the manner claimed by the Plaintiff.

## SCHEDULE C.

1. *Form of Order for Payment of a Debt or Legacy.*

In Chancery.

[Lord Chancellor,

Vice-Chancellor of England,

*or*, Vice-Chancellor ———, (*naming him*).]*or*,

[Master of the Rolls.]

*Date.*Between *A. B.*, Plaintiff.*C. D.*, Defendant.

Upon motion this day made unto this Court by Mr. ———, of Counsel for the Plaintiff, and upon hearing Mr. ———, of Counsel for the Defendant, [*or*, upon reading a certificate of an appearance having been entered by the Defendant, *or*, upon hearing an affidavit of service upon the Defendant of the writ of summons issued in this cause,] and upon reading the claim filed in this cause on the ———

day of ——— [and an affidavit of ——— filed in this cause,]  
 [or, the Defendant by his Counsel admitting assets of the  
 testator, or, intestate in the said claim named,] this Court  
 doth order, that the Defendant do, within a month after ser-  
 vice upon him of this order, pay to the Plaintiff the sum of  
 ——— pounds, together with interest thereon, at the rate of  
 ——— pounds per cent. per annum, from the ——— day of  
 ——— to the time of such payment, together with the costs  
 of this suit, to be taxed by the Taxing Master in rotation.

---

2. *Form of Order on Executor or Administrator to account,  
 on Claim by a Creditor of Testator or Intestate.*

In Chancery.

[Lord Chancellor,  
 Vice-Chancellor of England,  
 or, Vice-Chancellor ———, (*naming him*).]  
*or,*  
 [Master of the Rolls.]

*Date.*

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth  
 declare, that all persons who are creditors of the said tes-  
 tator or intestate are entitled to the benefit of this order.  
 And it is ordered, that it be referred to the Master of this  
 Court in rotation to take an account of what is due to the  
 Plaintiff, and all other the creditors of ——— deceased, the  
 testator [or, intestate] in the Plaintiff's claim named, and  
 of his funeral expenses. And it is ordered, that the Master  
 do take an account of the personal estate of the said testa-  
 tor [or, intestate] come to the hands of the said Defendant,  
 his executor [or, administrator,] or to the hands of any  
 other person or persons, by his order or for his use. And  
 it is ordered, that the said testator's [or, intestate's] per-

sonal estate be applied in payment of his debts and funeral expenses in a due course of administration. And this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.

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3. *Form of Order to account on Claim by a Legatee.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

*Date.*

Between *A. B.*, a legatee of ———, } Plaintiff.  
deceased . . . . . }  
*C. D.* . . . . . Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth declare, that all persons who are legatees of the said testator are entitled to the benefit of this order. And it is ordered, that it be referred to the Master of this Court in rotation, to take an account of the personal estate not specifically bequeathed of ———, deceased, the testator in the Plaintiff's claim named, come to the hands of the Defendant, or to the hands of any other person or persons by his order or for his use. And it is ordered, that the said Master do take an account of the said testator's debts, funeral expenses, and of the legacies given by his will. And it is ordered, that the said testator's said personal estate be applied in payment of his funeral expenses and debts in a due course of administration, and then in payment of his legacies. And this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.

4. *Form of Order to account, on Claim by a Residuary Legatee, or one of several Residuary Legatees.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

*Date.*

Between <i>A. B.</i> , a residuary legatee	} Plaintiff.
of ———, deceased . . . .	
<i>C. D.</i> . . . .	Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth declare, that all the residuary legatees named or described in the will of ———, deceased, the testator named in the Plaintiff's claim, are entitled to the benefit of this order, and to attend the proceedings under the same before the Master; and it is referred to the Master to inquire and state to the Court, who were the residuary legatees of the testator living at the time of his death, and whether any of them are since dead, and if dead, who is or are their legal personal representative or representatives; and if the Master shall find that all such residuary legatees, or their legal personal representatives have been duly served with writs of summons, he is to proceed to take an account, &c. [*as in No. 3, to the end.*]

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5. *Form of Order to account on Claim by the next of Kin,  
or one of the next of Kin, of an Intestate.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

*Date.*

Between A. B., Plaintiff.

C. D., Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth declare, that all the next of kin according to the Statutes of Distribution, of ———, the intestate named in the Plaintiff's claim, are entitled to the benefit of this order, and to attend the proceedings before the Master under the same. And it is referred to the Master of this Court in rotation to inquire and state to the Court, who were the next of kin, according to the Statutes of Distribution, of the said ———, living at the time of his decease, and whether any of them are since dead, and if dead, who is or are their legal personal representative or representatives; and if the said Master shall find that such next of kin have been duly served with writs of summons to attend the proceedings before him under this order, then it is ordered, that it be referred to the said Master to take an account of the said intestate's personal estate [*usual accounts of personal estate, debts, and funeral expenses, &c., as in Form No. 3.*]

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6. *Form of Order for Account of Personal Estate of a Deceased Person, on the Claim of the Executor or Administrator.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

*Date.*

Between A. B., Plaintiff.

C. D., Defendant.

Upon motion, &c., [*as in Form No. 1*] this Court doth declare, that all persons interested in the personal estate of the said testator [*or, intestate*] are entitled to the benefit of this order. And it is ordered, that it be referred to the Master to take an account of the testator's [*or, intestate's*] personal estate possessed by the Plaintiff or by any other person by his order or for his use, and also to take an account of the testator's [*or, intestate's*] funeral expenses, debts, and legacies; and it is ordered, that such personal estate be applied in a due course of administration in payment of such funeral expenses, debts, and legacies; and any further directions which may be necessary are hereby reserved, &c.

*7. Form of Order of Foreclosure, on Claim by a Legal or Equitable Mortgagee.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]

or,

[Master of the Rolls.]

*Date.*

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth order, that it be referred to the Master of this Court in rotation, to take an account of what is due to the Plaintiff for principal and interest on the mortgage [*or, equitable mortgage*] in the Plaintiff's claim mentioned. And it is ordered, that it be referred to the Taxing Master in rotation to tax the Plaintiff his costs of this suit. And upon the Defendant paying to the Plaintiff what shall be reported due to him for principal and interest as aforesaid, together with the said costs when taxed, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered, that the Plaintiff [do re-convey the mortgaged premises in the Plaintiff's affidavit of claim mentioned, free and clear of all incumbrances done by him, or any claiming by, from, or under him, and] do deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said Defendant, or to whom he shall appoint. But in default of the Defendant paying unto the Plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered, that the Defendant [do stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the

said mortgaged premises] do convey to the Plaintiff the premises comprised in the equitable mortgage in the Plaintiff's affidavit of claim mentioned, free and clear of all right, title, interest, and equity of redemption of, in, and to the said premises; and the Master is to settle the conveyance, if the parties differ about the same.

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8. *Form of Order of Sale, on Claim by a Legal or Equitable Mortgagee or Person entitled to a Lien.*

In Chancery.

[Lord Chancellor,

Vice-Chancellor of England,

or, Vice-Chancellor, ———, (*naming him*).]

or,

[Master of the Rolls.]

*Date.*

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth order, that it be referred to the Master of this Court in rotation to take an account of what is due to the Plaintiff for principal and interest on the mortgage [*or, equitable mortgage, or, lien*] in the Plaintiff's claim mentioned. And it is ordered, that it be referred to the Taxing Master in rotation to tax the Plaintiff his costs of this suit. And upon the Defendant paying to the Plaintiff what shall be reported due to him for principal and interest as aforesaid, together with the said costs, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered, that the Plaintiff [do re-convey the mortgaged premises in the Plaintiff's affidavit of claim mentioned, free and clear of all incumbrances done by him, or any claiming by, from, or under him, and] do deliver up all deeds and writings

in his custody or power relating thereto, upon oath, to the Defendant, or to whom he shall appoint; but in default of the Defendant paying to the Plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid, then it is ordered, that the said mortgaged premises [*or, the premises subject to the said equitable mortgage, or, lien*] be sold, with the approbation of the said Master. And it is ordered, that the money to arise by such sale be paid into Court to the end that the same may be duly applied in payment of what shall be found due to the Plaintiff for principal, interest, and costs as aforesaid; and this Court doth reserve the consideration of all further directions until after the said Master shall have made his report.

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9. *Form of an Order for Redemption on Claim by Person entitled to redeem.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]

or,

[Master of the Rolls.]

*Date.*

Between A. B., Plaintiff.

C. D., Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth order, that it be referred to the Master in rotation to take an account of what is due to the Defendant for principal and interest on his mortgage [*or, equitable mortgage, or, lien*] in the Plaintiff's claim mentioned. And it is ordered, that it be referred to the Taxing Master in rotation to tax the Defendant his costs of this suit. And upon the Plaintiff paying to the Defendant what shall be reported due to him for principal and interest, together with such costs, when taxed, within six months after the said Master shall

have made his report, at such time and place as the said Master shall appoint, this Court doth order, that the Defendant do re-convey the mortgaged premises [*or, deliver up possession of the property subject to the equitable mortgage, or, lien*] in the Plaintiff's claim mentioned, free and clear from all incumbrances done by him, or any claiming by, from, or under him, and do deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the Plaintiff or to whom he shall appoint, but in default thereof the Plaintiff's said claim is to stand dismissed out of this Court, with costs, to be taxed by the said Taxing Master, and to be paid by the Plaintiff to the Defendant.

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10. *Form of Order of Reference of Title, on Claim of Person seeking Specific Performance.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
*or, Vice-Chancellor, ———, (naming him).]*

*or,*

[Master of the Rolls.]

*Date.*

Between *A. B.*, Plaintiff.

*C. D.*, Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth order, that it be referred to the Master of this Court in rotation to inquire whether a good title can be made to the property comprised in the agreement in the said Plaintiff's claim mentioned. And in case the said Master shall be of opinion that a good title can be made, it is ordered, that he do state at what time it was first shewn that such good title could be made; and this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.

11. *Form of Order for an Account of Partnership Dealings and Transactions, on Claim of Person entitled to the Account.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

*Date.*

Between *A. B.*, Plaintiff  
*C. D.*, Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth order, that it be referred to the Master of this Court in rotation to take an account of the partnership dealings and transactions between the Plaintiff and the Defendant, from the ——— day of ———: And it is ordered, that what, upon taking the said account, shall be found due from either of the said parties to the other of them, be paid by the party from whom to the party to whom the same shall be found due; [and this Court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.]

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12. *Form of an Order on Claim by a Person claiming to use the Name of his Trustees.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of ~~the~~ Rolls.]

*Date.*

Between A. B., Plaintiff.

C. D., Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth order, that the Plaintiff be at liberty to use the name of the Defendant, in prosecuting the action at law in the Plaintiff's claim mentioned, on indemnifying the Defendant against the costs of such action. And it is ordered, that it be referred to the Master of this Court in rotation to settle the indemnity to be given by the Plaintiff to the Defendant, in case the parties differ about the same.

13. *Form of Order, on Claim for the Appointment of New Trustees.*

In Chancery.

[Lord Chancellor,  
Vice-Chancellor of England,  
or, Vice-Chancellor ———, (*naming him*).]  
or,  
[Master of the Rolls.]

*Date.*

Between A. B., Plaintiff.

C. D., Defendant.

Upon motion, &c. [*as in Form No. 1*] this Court doth order, that it be referred to the Master of this Court in ro-



tation to appoint ——— proper persons to be new trustees under the indenture [*or, will or other instrument*] in the Plaintiff's claim mentioned, in the place of [*or, to act in conjunction with*] the Defendant. And it is ordered, that the Defendant do convey [*assign or transfer*] the trust fund or property [*referring to it*] to such new trustees [*or, so as to vest the same in such new trustees jointly with himself,*] upon the trusts of the said indenture [*or, will or other document,*] or such of them as are now subsisting and capable of taking effect, and they are to declare the trust thereof accordingly, such conveyance [*or, assignment*] to be settled by the said Master, in case the parties differ about the same. [And it is ordered, that the Defendant do deliver over to such new trustees all deeds and writings in his custody or power relating to the said trust property.]

[To be omitted  
in the case of  
infants or  
charities.]  
[To be omitted  
where the De-  
fendant is con-  
tinued a trus-  
tee.]

COTTENHAM, C.

LANGDALE, M. R.

LANCELOT SHADWELL, V. C. E.

J. L. KNIGHT BRUCE, V. C.

JAMES WIGRAM, V. C.

## ORDER OF COURT.

*Monday, the 3rd day of June, 1850.*

THE Right Honourable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls, the Right Honourable Sir LANCELOT SHADWELL, Vice-Chancellor of England, the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Right Honourable the Vice-Chancellor Sir JAMES WIGRAM, DOTH HEREBY, in pursuance of an Act of Parliament passed in the fourth year of the reign of Her present Majesty, 4 Vict. c. 94. intituled "An Act for facilitating the Administration of Justice in the Court of Chancery," and of an Act passed in the fifth year of the reign of Her present Majesty, 5 Vict. c. 52. intituled "An Act to amend an Act of the Fourth Year of the Reign of Her present Majesty, intituled 'An Act for facilitating the Administration of Justice in the Court of Chancery,'" and of an Act passed in the eighth and ninth years of the reign of Her present Majesty, 8 & 9 Vict. c. 105. intituled "An Act for amending certain Acts of the Fourth and Fifth Years of the Reign of Her Majesty for facilitating the Administration of Justice in the Court of Chancery, and for providing for the Discharge of the Duties of the Subpœna Office after the Death, Resignation, or removal of the present Patentee of that Office," and in pursuance and execution of all

other powers enabling him in that behalf, ORDER AND DIRECT, That all and every the Rules, Orders, and Directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be, GENERAL ORDERS AND RULES OF THE HIGH COURT OF CHANCERY; viz.

Order of reference to be brought into Master's office within ten days.

I. Every decree or order of reference is to be brought into the Master's Office by the party having the carriage thereof, within ten days after the same shall have been passed and entered, and in default thereof any other party to the cause or matter is to be at liberty to bring in the same, and such party shall have the carriage of the proceedings under such decree or order, unless the Master shall otherwise specially direct.

Master may require a class to be represented by one solicitor;

and if the parties differ, may nominate such solicitor.

Party represented by different solicitor to pay his own costs.

II. If upon the warrant taken out for considering the decree or order of reference, or at any time during the reference, it shall appear to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he is to be at liberty to require the persons constituting each or any class to be represented by the same solicitor; and if the parties constituting such class cannot agree upon the solicitor to represent them, the Master is to be at liberty to nominate such solicitor for the purpose of the proceedings before him; and if any of the parties constituting such class shall decline to authorise the solicitor so nominated to act for him, and shall insist upon being represented by a different solicitor, such party shall personally pay the costs of his own solicitor of and relating to the proceedings before the Master with respect to which such nomination shall have been made, and all such further costs as shall be occasioned to any of the parties by his being represented by a different solicitor from the solicitor so to be nominated.

III. The arrangement and regulation of the course of proceedings under each reference are to be wholly subject to the control and direction of the Master, and the Master is to proceed with the reference made to him as speedily as the nature thereof, and the business of the office will allow.

Proceedings to be wholly subject to the control of the Master.

IV. The duration of warrants to proceed upon any reference before the Master, is not to be limited to an hour, or any other period of time; and the proceedings upon any warrant are, as far as possible, to be continued consecutively from hour to hour, and from day to day, until the same shall be completed, but not so as to cause unreasonable delay in other causes or matters depending before the Master; and the Master shall therefore be at liberty to adjourn the further hearing of any matter or thing before him, to such future day as he shall think fit; and on every such adjournment the parties shall be obliged to attend without a further warrant, unless the Master shall otherwise direct.

Proceedings upon any warrant to be continued consecutively from day to day until completed.

Master may adjourn further hearing, which parties must attend without further warrant.

V. The Master shall give priority, as far as may be, to exceptions for insufficiency, impertinence, and scandal, and to matters and applications under 3 & 4 Will. IV, c. 94, s. 13, and the Orders made in pursuance thereof, and to any other matters or applications requiring immediate despatch.

Master to give priority to exceptions, and other matters requiring despatch.

VI. The Master's power to proceed *ex parte*, in case of the non-attendance of any party on any warrant, shall extend to the case of his non-attendance upon any adjournment of any warrant.

*Ex parte* proceeding on adjournment of warrant.

VII. The Master's power to award costs in case of the non-attendance of any party upon any warrant, is to ex-

Master may award costs in case of non-

attendance on  
adjournment of  
warrant.

tend to the case of his non-attendance upon any adjournment of any warrant to a fixed time.

Master to report  
circumstance of  
undue delay.

VIII. In all cases when a proceeding has been unduly delayed, by reason of the neglect of any party or his solicitor, the Master shall, in the first report which he shall make on the subject-matter, in respect of which such proceeding has been unduly delayed, state specially to the Court the circumstances of such delay, in order that the Court may, if it shall so think fit, in addition to and notwithstanding any costs which the Master may have certified to be paid in the course of the proceedings before him, make such further order in respect thereof as justice shall require.

Master may dis-  
allow state-  
ments which are  
impertinent, or  
unnecessarily  
long.

IX. If it shall appear to the Master that any state of facts, affidavit, or other proceeding before him, contains statements which are impertinent or of unnecessary length, he shall be at liberty (without any application made to him for the purpose) to disallow such matter, distinguishing by his initials in the margin the parts so disallowed; and he shall cause a memorandum of his having disallowed such impertinent matter to be indorsed on the office copies of the draft of his report, as to the particular inquiry on which such state of facts, affidavit, or other proceeding shall have been used before him; and in the taxation of costs, no costs shall be allowed to the parties by or on whose behalf such state of facts, affidavit, or other proceeding was brought into the Master's Office, for or in respect of the matter so disallowed, and the Taxing Master shall allow to the other parties to the suit or matter all such costs, as have been incurred by or occasioned to them by reason of the matter so disallowed; and such costs shall be paid by the party by or on whose behalf such state of facts, affidavit, or other proceeding was so brought in.

Costs of such  
statements.

X. In all proceedings before the Master, where he is attended by Counsel, the allowances on the taxation of costs in respect of the fees to such Counsel are to be regulated upon the same principle as if the proceedings were before the Court.

Fees of Counsel before Master to be regulated by same principle as if proceedings were before the Court.

XI. The costs of procuring the attendance of Counsel before the Master are to be allowed on the taxation of costs as between party and party, in all cases in which the Master shall certify such attendance to be proper, and in no other case.

Costs of attendance of Counsel before Master to be in discretion of Master.

XII. In case of the absence, from illness or otherwise, of any Master to whom any cause or matter is referred, any other Master may, with his concurrence, act in the place of the Master so for the time being absent; but any order or other proceeding to be made or had by or before such Master so acting, is to be entered as made or had by or before him for or in the place of the Master to whom the reference is made.

Any Master may act for absent Master with his concurrence.

XIII. The Masters are forthwith and from time to time to meet and consider such additional Orders or Regulations as may appear to them, or the majority of them, calculated to expedite and facilitate the satisfactory transaction of the business of the suitors in their offices, and to report such additional Orders or Regulations to the Lord Chancellor, to the end that, if the same should be approved by him, proper steps may be taken for such additional Orders or Regulations being adopted and duly made General Rules and Orders of the Court.

Masters from time to time to consider and report to the Lord Chancellor as to any additional Orders.

XIV. The Registrars are forthwith and from time to time to meet and consider such Orders or Regulations as may appear to them, or the majority of them, calculated to expedite and facilitate the satisfactory transaction of

Registrars from time to time to consider and report to the Lord Chancellor as to any additional Orders.

## ORDERS IN CHANCERY.

the business of the suitors in their office, and to report such Orders or Regulations to the Lord Chancellor, to the end that, if the same be approved by him, proper steps may be taken for such Orders or Regulations being adopted and duly made General Rules and Orders of the Court.

XV. That this Order be drawn up and entered by the Registrar of the said Court.

(Signed) COTTENHAM, C.  
LANGDALE, M.R.  
LANCELOT SHADWELL, V.C.E.  
J. L. KNIGHT BRUCE, V.C.  
JAMES WIGRAM, V.C.

## ORDER OF COURT.

2nd November, 1850.

THE Right Honourable THOMAS LORD TRURO, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable HENRY LORD LANGDALE, Master of the Rolls, and the Right Honourable the Vice-Chancellor Sir JAMES LEWIS KNIGHT BRUCE, and the Honourable the Vice-Chancellor Sir ROBERT MONSEY ROLFE, DO TH HEREBY, in pursuance of an Act of Parliament passed in the session of Parliament holden in the thirteenth and fourteenth years of the reign of Her present Majesty, intituled "An Act to diminish the Delay and Expense of Proceedings in the High Court of Chancery in England," and in pursuance and execution of all other powers enabling him in that behalf, ORDER AND DIRECT, that all and every the Rules, Orders, and Directions hereinafter set forth, shall henceforth be, and for all purposes be deemed and taken to be, GENERAL RULES AND ORDERS OF THE HIGH COURT OF CHANCERY; viz.—

13 & 14 Vict.  
c. 35.*Introductory.*

I. The several Orders comprised in the General Order of the 3rd of *April*, 1828, which are respectively numbered 7, 9, and 10; and the Order comprised in the General Order of the 21st of *December*, 1833, which is numbered 19; and the Order comprised in the General Order of the 9th *May*, 1839, which is numbered 6; and the several Orders

Repeal of several Orders, so far as are inconsistent with these Orders.



or parts of Orders comprised in the General Order of the 8th day of *May*, 1845, which are respectively numbered as the second Article of the 14th of the said Order; and the 6th, 7th, 8th, 9th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, and 31st Articles of the 16th of the said Order; and the several Orders comprised in the said last-mentioned General Order, which are respectively numbered 17, 19, 38, 39, 40, 41, and 42; and all other Orders and parts of Orders, so far as such other Orders and parts of Orders are inconsistent with these Orders, but not further or otherwise, are hereby abrogated and discharged.

II. All former Orders and parts of Orders not specified in Order I, so far as the same are now in force, and consistent with these Orders, or applicable to the same, or the subject-matter thereof, are to remain in full force and effect.

*When these Orders are to come into Operation.*

Time at which these Orders come into operation.

III. These Orders are, as to all suits or matters now pending or hereafter to be commenced, to take effect on this 2nd day of *November*, 1850.

*Exceptions to Pleadings, &c., for Scandal, Impertinence, or Insufficiency.*

Cases in which vacation not to be reckoned.

IV. The times of vacation are not to be reckoned in the computation of the time allowed for filing or setting down exceptions for scandal, impertinence, or insufficiency, in cases where the time is not limited by notice given pursuant to the 13th of these Orders.

Orders not to apply to references now pending.

V. These Orders do not apply to any reference for scandal, impertinence, or insufficiency pending before any of the Masters at the time when these Orders come into operation; but as to all such references the existing Rules and Orders of the Court are to remain in force.

VI. No order is to be made for leave to file exceptions *nunc pro tunc*. No exceptions  
*nunc pro tunc*.

VII. A Defendant, whose answer is not excepted to or set down for hearing on former exceptions, alleging that the Plaintiff is prosecuting him in this Court and also at law for the same matter, may, upon the expiration of eight days after his answer or further answer is filed, obtain, as of course, on motion or petition, the usual order for the Plaintiff to make his election in which Court he will proceed. Election whether Plaintiff  
will proceed at  
law or in equity.

VIII. After the filing of a Defendant's answer, the Plaintiff has six weeks within which he may file exceptions thereto for insufficiency. Time for except-  
ing for insuffi-  
ciency.

If he does not file exceptions within six weeks such answer, on the expiration of the six weeks, is to be deemed sufficient.

IX. A Defendant desiring to prevent exceptions to his answer for insufficiency being set down for hearing, has for that purpose only eight days after the filing of such exceptions within which he may submit to the same. Time for sub-  
mitting to ex-  
ceptions.

X. If a Defendant, not being in contempt, submits to exceptions to his answer for insufficiency before the Plaintiff has set them down for hearing, he is allowed three weeks from the date of the submission within which he is to put in his further answer to the bill. Time for put-  
ting in further  
answer after  
submission to  
exceptions.

XI. The Plaintiff having filed exceptions for insufficiency to a Defendant's answer, is not to set them down for hearing before the expiration of eight days from the filing of such exceptions, unless in a case of election he is required by notice in writing from such Defendant to set them down in four days, pursuant to the 13th of these Time for setting  
down excep-  
tions for insuffi-  
ciency, except  
in election or  
injunction cases.

Orders, or in a case where the common injunction may be obtained or retained on the allowance of such exceptions.

Setting down  
exceptions for  
hearing.

XII. Exceptions to answers for insufficiency, or to any pleading or other matter depending before the Court for scandal or impertinence, or for scandal and impertinence, are to be set down for hearing by the Registrar at the request of the party filing the same, upon the production of a certificate of the Clerk of Records and Writs of the filing of such exceptions, or (in the case of exceptions to an answer for insufficiency) of the filing of a further answer; and the same are to be advanced and put in the paper for hearing on an early day; and the party setting down any such exceptions shall, on the day on which the same shall be so set down, serve a notice thereof on the party whose pleading or other matter is excepted to, otherwise the said exceptions shall be deemed not set down.

Such exceptions  
to be advanced.

Defendant may  
require excep-  
tions to be set  
down within  
four days, where  
Plaintiff is pro-  
ceeding at law  
and in equity.

XIII. A Defendant, whose answer is excepted to, alleging that the Plaintiff is prosecuting him in this Court and also at law for the same matter, may, by notice in writing, require the Plaintiff to set down the exceptions within four days from the service of the notice.

And if the Plaintiff does not set down such exceptions within such four days, such Defendant is entitled as of course, on motion or petition, to obtain the usual order for the Plaintiff to make his election in which Court he will proceed.

Exceptions for  
insufficiency to  
be set down  
after eight and  
within fourteen  
days.

XIV. The Plaintiff having filed exceptions for insufficiency to a Defendant's answer is to set them down for hearing after the expiration of eight days, but within fourteen days from the filing of such exceptions.

If he does not, the answer on the expiration of such fourteen days is to be deemed sufficient.

XV. The Plaintiff, having shewn exceptions to a Defendant's answer for insufficiency as cause against dissolving an injunction, is to set down such exceptions for hearing at the latest on the day next after shewing such exceptions as cause.

In injunction cases, exceptions if shewn as cause must be set down the next day.

If he does not, the injunction is dissolved.

XVI. After the filing of exceptions to a Defendant's answer for insufficiency, and any further answer put in, the Plaintiff has fourteen days from the filing of such further answer, within which he may set down the old exceptions.

Time for setting down exceptions after further answer.

If the old exceptions be not set down within fourteen days after such further answer put in, the answer is, on the expiration of such fourteen days, to be deemed sufficient.

XVII. After exceptions to an answer for insufficiency are set down for hearing, if a Defendant not being in contempt submits to answer, or the Court holds the answer to be insufficient, the Court may in such cases appoint the time within which such Defendant is to put in his further answer.

Court to appoint time to answer, where exceptions for insufficiency are submitted to after being set down, or are allowed.

If such Defendant does not obtain time from the Court, or does not answer within the time which the Court allows, the Plaintiff may sue out process of contempt against such Defendant.

XVIII. The answer of a Defendant is to be deemed sufficient—

When answer to be deemed sufficient.

1. If no exception for insufficiency be filed thereto within six weeks after the filing of such answer.

2. If, exceptions being filed, the Plaintiff does not set them down for hearing within fourteen days after the filing thereof.

3. If within fourteen days after the filing of a fur-

ther answer, the Plaintiff does not set down the old exceptions.

On setting down old exceptions, the particular exceptions to be specified.

XIX. If, after a Defendant's second or third answer is filed, the Plaintiff sets down the old exceptions for insufficiency, then the particular exception or exceptions to which he requires a further answer is or are to be stated in the notice of setting down such exceptions.

Time at which answer to be deemed sufficient or insufficient.

XX. If, upon the hearing of exceptions, the answer be held sufficient, it shall be deemed to be so from the date of the order made on the hearing; and if the Defendant submit to answer without an order from the Court, the answer shall be deemed insufficient from the date of the submission.

Where first or second answer held insufficient, Court may appoint time for further answer.

XXI. The Court holding a first or second answer to be insufficient, may appoint the time within which a Defendant who is not in contempt is to file a further answer.

Where third answer held insufficient, Court may order examination on interrogatories.

XXII. Upon a third answer being held to be insufficient, the Court may order the Defendant to be examined upon interrogatories to the points held to be insufficient, and to stand committed until he shall have perfectly answered the interrogatories; and the Defendant is to pay such costs as the Court shall think fit to award.

Exceptions for scandal or impertinence to be signed by Counsel, and particular passages specified.

XXIII. No pleading or other matter depending before the Court is to be set down for hearing for scandal or impertinence, unless exceptions are taken in writing and signed by Counsel, describing the particular passages which are alleged to be scandalous or impertinent.

Time for setting down exceptions for scandal and impertinence.

XXIV. Where any person or party having filed exceptions to any pleading or other matter depending before the Court for scandal, and any person or party having

filed such exceptions for impertinence does not set the same down for hearing within six days after the filing thereof, such exceptions are to be considered as abandoned, and the person or party by whom such exceptions were filed is to pay to the opposite party such costs as may have been incurred by such party in respect of such exceptions.

XXV. Upon the production of an order made upon its being held that any pleading or other matter depending before the Court is scandalous or impertinent, the officer having the custody or charge of such pleading or other matter is to expunge from such pleading or other matter such parts thereof as the Court has held to be scandalous or impertinent; and thereupon the person or party requiring such scandalous or impertinent matter to be expunged, is to pay to the officer expunging the same, the same fee as on the like occasion has heretofore been paid.

Scandalous and impertinent matter to be expunged.

#### *Orders of Course.*

XXVI. Applications to discharge, reverse, or alter any order made on motion or petition of course by the Lord Chancellor, the Master of the Rolls, or one of the Vice-Chancellors, are to be made to the Judge to whom special applications in the cause or matter in which such order is made ought to be made according to the practice of the Court, and the General Rules and Orders applicable thereto.

Judge to whom applications to discharge &c. orders of course are to be made.

XXVII. Every petition or motion paper for a reference under the 19th section of the said Act is to be marked at or near the top or upper part thereof in the same manner as a bill is now marked with the name of the Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls; and every order for any such reference is to be marked in the same manner as the said petition or motion paper; and the matter in which such order is made is thenceforth to be considered as at-

Applications under the 19th section of the 13 & 14 Vict. c. 35, and orders thereon, to be attached to particular Court.

tached to the Court of the Judge whose name shall be so marked upon such order, in like manner and for the like purpose as causes are attached to such Court, but shall be subject to be transferred from such Court in the same manner as causes are so transferred; and the provisions of the Order comprised in the General Order of the 5th of *May*, 1837, which is numbered 15, and of the General Order of the 5th of *August*, 1842, shall apply to every matter so attached.

*Fees.*

*Fees.*

XXVIII. The fees to be received and taken by the Registrars and their Clerks, and by the Clerks of Records and Writs and their Clerks respectively, for filing a special case and all proceedings thereupon, are to be the same as are now received and taken by them respectively for filing a bill and for proceedings in suits instituted by bill; and the fees to be received and taken by the Registrars and their Clerks for setting down exceptions for scandal, impertinence, and insufficiency, and for orders made thereon, are to be the same as are now received and taken for setting down exceptions and for orders made thereon.

(Signed) **TRURO, C.**

**LANGDALE, M. R.**

**J. L. KNIGHT BRUCE, V. C.**

**R. M. ROLFE, V. C.**

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*2nd November, 1850.*

WHEREAS the Right Honourable Sir *Lancelot Shadwell*, Knight, Vice-Chancellor of *England*, hath departed this life: And whereas the Right Honourable Sir *James Wigram*, Knight, late one of the Vice-Chancellors of the Court of Chancery, hath resigned his office: And whereas the Honourable Sir *Robert Monsey Rolfe*, Knight, hath been appointed by her Majesty a Vice-Chancellor of the said Court of Chancery: And whereas it is necessary to make

provision for the hearing of the causes and matters which at the times of such death and resignation respectively were attached to the respective Courts of the said late Vice-Chancellors, and to make other regulations necessary in consequence of such death and resignation: Now I do  
**HEREBY ORDER—**

I. That the Order numbered I. of the General Order, dated the 11th *November*, 1841, be abrogated and discharged.

Order I. of 11th November, 1841, abrogated.

II. That in all informations or bills to be marked under the 1st Order of the 5th day of *May*, 1837, with the words "Lord Chancellor," the Plaintiff shall, underneath the words "Lord Chancellor," write the name of one of the Vice-Chancellors at his option, and the cause shall thenceforth, unless removed by some special order of the Lord Chancellor, be attached to such Vice-Chancellor's Court.

Bills, &c. not marked for M. B. to be attached to Court of one of the Vice-Chancellors.

III. That every cause and matter which at the time of his said resignation was attached to the Court of the late Vice-Chancellor Sir *James Wigram* be transferred to the Court of the Vice-Chancellor Sir *James Lewis Knight Bruce*; and every such cause and matter is henceforth attached to the Court of the said Vice-Chancellor Sir *James Lewis Knight Bruce*, unless removed therefrom by any special order to be made by the Lord Chancellor.

Cause, &c. attached to Court of Vice-Chancellor *Wigram*, to be transferred to Court of Vice-Chancellor *Knight Bruce*.

IV. That every cause and matter which was attached to the Court of the late Vice-Chancellor of *England* at the time of his death (unless the same has been since transferred to the Court of any other Judge) be transferred to the Court of the Vice-Chancellor Sir *Robert Monsey Rolfe*; and every such cause and matter is henceforth attached to the Court of the said Vice-Chancellor Sir *Robert Monsey*

Cause, &c. attached to Court of Vice-Chancellor of *England* to be transferred to Court of Vice-Chancellor *Rolfe*.



*Rolfe*, unless removed therefrom by any special order to be made by the Lord Chancellor.

Pleas, &c. standing for hearing in paper of Vice-Chancellor *Wigram* to be transferred to paper of Vice-Chancellor *Knight Bruce*.

V. That all pleas, demurrers, causes, claims, rehearings, further directions, exceptions, and petitions now standing for hearing in the paper of the late Vice-Chancellor Sir *James Wigram*, be transferred to the paper of the Vice-Chancellor Sir *James Lewis Knight Bruce*.

Pleas, &c. standing for hearing in paper of Vice-Chancellor of *England* to be transferred to paper of Vice-Chancellor *Rolfe*.

VI. That all pleas, demurrers, causes, claims, rehearings, and further directions, exceptions, and petitions now standing for hearing in the paper of the late Vice-Chancellor of *England* be transferred to the paper of the Vice-Chancellor Sir *Robert Monsey Rolfe*.

Motions, &c. in such causes to be heard by Judge to whose Court they are hereby attached.

VII. That all motions, petitions, and further proceedings, in causes and matters to which the foregoing Orders refer, shall (subject to the provisions of the 15th of the General Orders of the 5th *May*, 1837,) be heard before the Judges to whose Court the same are under the provisions of these Orders respectively attached, unless removed therefrom by any special order of the Lord Chancellor.

Entered E. R.

TRURO C.

# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

## High Court of Chancery.

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### THE ATTORNEY-GENERAL v. THE CORPORATION OF LONDON AND OTHERS.

1849.  
Dec. 8th,  
13th, 14th,  
& 17th,  
and  
1850.  
Jan. 14th.

**T**HIS was an *ex officio* information, filed by her Majesty's Attorney-General against the Corporation of the City of

An information by the Attorney-General,—after stat-

ing the title of the Crown to the bed of the river *Thames*, and to the land and soil under all navigable rivers; that her Majesty was, and had from time immemorial been, seised of the port and haven of *London* and of the river *Thames*, the same being an arm of the sea, into which the sea always flowed and reflowed; that the river had always been navigable; that the Defendants had at all times been conservators of the river, and claimed the freehold of the soil, and, under that title, had made certain grants, which were pretended to be supported by their claim to the freehold, which the information alleged to be bad, inasmuch as the Defendants had no freehold; that such grants were injurious to the navigation of the river, and therefore obnoxious as nuisances, even supposing that the Defendants had any such freehold; that it would be the Defendants' duty, as conservators of the river, not to permit encroachments, which, it was alleged by the information, were injurious to its navigation; that the Defendants pretended that they had a grant of the bed of the river from the Crown, and that they had some charters, not containing the grant, but recognising the grant,—charged,—that there was no such grant of the freehold in any charter from the Crown to the Defendants, and that there was no charter recognising such grant. Other pretences of title by the Defendants were stated in the information, and negatived by it; and it concluded with the charge that the Defendants had in their possession &c. divers documents relating to the matters aforesaid. The Defendants, by their answer, denied the title of the Crown to the bed of the river *Thames*, and left it as a matter of law whether any such general right existed in the Crown as was claimed by the information; and they met the fact of title of the Crown to the land and soil of the river by a direct negative, and insisted that the Crown was not, but that the Defendants were, entitled thereto. The Defendants admitted that they had held the office of conservators:—*Held*, that the answer was insufficient.

A Plaintiff is entitled to a discovery from the Defendant, not only of that which constitutes his own original title, and of what the Defendant's case is, [though not to the discovery of the evidence by which that defence is intended to be supported], but also to a discovery to enable him to repel a defence which he expects will be set up.

The object of the Stat. 21 Jac. 1, c. 14, was to place a party contesting with the Crown in the same situation as a party contesting with any other Plaintiff.

An agent cannot gain an adverse title, unless he can very distinctly shew that what he has done is in respect of title, and not of his agency.

Where it is charged by a bill that the Defendants have in their possession documents which relate

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*Statement.*

*London, and William Cubitt, Sir Thomas Turton, John Oliver Hanson, William George Prescott, Sir Courtenay Boyle, John Peter Rasch, and John Cornelius Park.*

The substance of the information will be found satisfactorily stated in the 8th Vol. of Mr. Beavan's Reports, p. 270, on the argument before the *Master of the Rolls* of the demurrer and answer put in to the information by the Corporation of *London*. On that occasion the demurrer was overruled by the *Master of the Rolls*. On the 4th of July, 1848, the Corporation of the City of *London* filed their further answer to the information, to which five exceptions were taken on behalf of the *Attorney-General*, and afterwards referred to the Master and allowed by him. The Master's report, allowing the several exceptions taken to the answer, was excepted to on the part of the Corporation, and after argument before the *Master of the Rolls*, his Lordship made an order overruling all the exceptions to the report. From that order the Corporation now appealed to the *Lord Chancellor*. The purport and effect of the information and answer thereto being stated in the *Lord Chancellor's* judgment, it has not been deemed proper to insert the same here.

The five following passages contained in the information were those to which the Master reported that no sufficient answer had been made by the Defendants:—

1st, "Whether it is not true that no charter or letters

to the matters aforesaid, that is, the Plaintiff's title, (amongst other things,) it is not sufficient for the Defendants, with a view to excusing their production, simply to state their belief that such documents do not contain evidence of, or tend to shew, the Plaintiff's title; but they must, in distinct terms, negative the grounds on which the Plaintiff asks for their production.

Observations on the passages contained in Mitford on Pleadings in Equity, p. 190, 5th edit.; and Wigram on Discovery, p. 285, 2nd edit.

The principle of the rule, that the *Attorney-General* never receives or pays costs, will for the future be modified thus—viz. that the *Attorney-General* is not to receive costs in a contest in which he could have been called upon to pay costs, had he been a private individual; but the rule is not to be without exception.

patent, given or granted by any of her Majesty's predecessors, Kings or Queens of this realm, contain any grant of the ground, soil, or bed of the river *Thames* or of the shores thereof, between high and low water mark, to the said Mayor, commonalty, and citizens, or how do the Defendants make out the contrary; and that the said Defendants have not discovered and set forth under and by what charter, or letters patent, or other grant they claim to be entitled to the freehold of the said bed and shores of the river."

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2nd, "Whether it is not true, that, in no charter or charters granted to the City of *London* by any of her Majesty's predecessors, has any immemorial right of the Mayor, commonalty, and citizens to the ownership of the said soil, bed, and shores of the said river, as arising from some previous grant as aforesaid, been recognised and confirmed, or how do the Defendants make out the contrary; and that the said Defendants, the Mayor, commonalty, and citizens, have not discovered and set forth by what charter or letters patent or other documents they maintain that the said pretended right is recognised and confirmed."

3rd, "Whether it is not true that the said charter or letters patent of his late Majesty King Henry VI. is or are of no force and effect to pass and convey to the said Mayor, commonalty, and citizens the soil, bed, and shores of the said river, or how do the Defendants make out the contrary; and whether it is not true that such charter or letters patent has or have been subsequently revoked, resumed, or annulled, or how do the said Defendants make out the contrary."

4th, "Whether it is not true that no sufficient acts of ownership, on the part of the said Mayor, commonalty, and

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citizens, or other deeds, matters, or things, can be shewn as evidence of such immemorial usage as that set up by the said Mayor, commonalty, and citizens as aforesaid, or how do the Defendants make out the contrary."

5th, "And that the Defendants may in manner aforesaid answer and set forth whether they have not or had not lately, and when last, in their possession, custody, or power, divers or some and what books of account or accounts, deeds, instruments, charters, letters patent, copies of charters, copies of letters patent, leases, counterparts, entries, receipts, memoranda, agreements, maps, plans, elevations, drawings, papers, or writings relating to the matters aforesaid or to some or one of them, and whereby the truth of the several matters in the said information stated and charged, or some of them, would appear, and may set forth a full, true, and perfect list and schedule of all and every the said books of account and accounts, deeds, instruments, and charters, letters patent, copies of charters, copies of letters patent, leases, counterparts, entries, receipts, memoranda, agreements, maps, plans, elevations, drawings, papers, and writings, and set forth what have or hath become of such of them as are or is not now in their or his possession, custody, or power."

*Argument.*

Mr. *Bethell*, Mr. Serjeant *Merewether*, and Mr. *Randell*, in support of the appeal.

The title of the Defendants to the land between high and low water mark is evidenced by a long series of acts of ownership by or on the part of the Defendants, their rights being referred to in charters granted by the Crown and other documents, which the Defendants insist on their right to withhold from the Crown, as exclusively belonging to them. It appears from the information itself, that the title of the Crown requires no document to support it,

the Crown being entitled *jure coronæ* to the soil of all navigable rivers between high and low water mark. The discovery sought by the information is merely for the purpose of enabling the *Attorney-General* to impeach the title of the Defendants; but the rule of the Court is, not to compel the production by a Defendant of any documents that will impeach the Defendant's title. The reasoning of the learned Judge who decided the case in the Court below it is submitted is incorrect, or at least is not applicable to the case. The information is divisible into two parts: the first claim of the Crown is that of a private right to the bed of the river between high and low water mark; but if it should be determined not to be so entitled, then the Crown complains of the right of its subjects having been interrupted by nuisances caused by the Defendants. The Defendants' case is supported by that of *Smith v. Earl Stair and Her Majesty's Officers of State in Scotland*(a), determined in the House of Lords during the last session of Parliament. There is no reason in this case for requiring the production of any evidence, as the matter ought to be determined by a bill of peace after a trial has been had at law; indeed, the sole object on the part of the *Attorney-General* is to pick holes in the Defendants' title, and the answer states a variety of applications on the part of the Crown to the Defendants, the Corporation, to make grants for public purposes of portions of the soil and bed of the river *Thames*. As regards the office of Conservator, the Court below laboured under considerable misapprehension in supposing the office of Conservator of the river to be similar to the right of a bailiff to a private family, inasmuch as the right of conservancy arises from a variety of Acts of Parliament, and not from a prerogative right. The right of navigation and piscary, for the convenience of the public, is in the Crown, and the Conservator can prevent a public injury being done

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*Argument.*

(a) 6 Bell, 487.

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by means of illegal fishing, or the interruption to the navigation. The conservancy of the river arises out of a perpetual commission in the nature of a commission of the peace, and those commissions and the other documents of that nature are evidence of ownership within certain boundaries specified, and the Mayor of the city of *London* is the judicial officer of the Crown, and (the office being renewed from reign to reign) not a bailiff, which is an inaccurate expression. The statement in the judgment given in the Court below, that the origin of the office of bailiff is in respect of the territorial ownership of the Crown, is quite a misapprehension; and there is no reference in the judgment to the principles on which the case was argued in the Court below. The right of the Crown cannot be carried farther than the right of an heir in tail: *Lady Shaftesbury v. Arrowsmith* (a). A Plaintiff is only entitled to require the discovery from a Defendant of documents relating to the Plaintiff's own title, and not of documents that may manifest defects in the Defendant's title; and in the present case, the information clearly shews on the face of it, that the documents sought to be discovered are evidence of the Defendants' title, and not of the Plaintiff's. As to the costs, the ordinary practice has been for the *Attorney-General* neither to pay nor receive costs: *Smith v. Earl Stair and Her Majesty's Officers of State in Scotland* (b), *Bolton v. The Corporation of Liverpool* (c). [A considerable number of other cases having relation more or less to the right of the Crown to the bed and soil of the river were also cited in the course of the argument on behalf of the Defendants, when the *Lord Chancellor* observed, that he felt a difficulty in applying the authorities so cited to the case before him, which was merely one of pleading, involving the right to discovery, and not a question touching the rights of the Crown, the Defendants

(a) 4 Ves. 67.

(b) 6 Bell, 487.

(c) 3 Sim. 467; *S. C.*, on appeal, 1 My. & K. 88.

by their answer asserting an adverse title, but not denying the right of the Crown to the bed and soil of the river *Thames*.]

The *Solicitor-General* and Mr. *Maule*, contra.

The Defendants have not at present stated the case on which they intend to rely, with sufficient distinctness. The Informant is entitled to have a "discovery of the case on which the Defendants rely, and of the manner in which they mean to support it" (a). This answer gives no information as to the title which the Defendants mean to claim: *Balls v. Margrave* (b). In all the cases which have been cited where the Court refused to require the Defendant to produce evidence of his title, the Defendant had set up a clear and distinct claim in opposition to the Plaintiff: *Edwards v. Jones* (c), *Smith v. The Duke of Beaufort* (d), *Glover v. Hall* (e), *Buden v. Dore* (f), *Bolton v. The Corporation of Liverpool* (g). It was contended, that the right of the Crown to the bed of tidal rivers was not asserted prior to the time of James I; but the Treatise of Hale, *De Jure Maris* (h), refers to several grants of beds of rivers before the time of James I; and in all cases where such a claim has been set up in opposition to the Crown, it has been founded on a supposed or implied grant from the Crown.

[The LORD CHANCELLOR.—If the Defendants claim paramount to the Crown, how can the production of the documents in question affect them?]

The Corporation admit that they have from time immemorial held the office of Conservators of the river. If they

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(a) Mitford on Pleading, 9;  
Wigram on Discovery, 285.

(b) 3 Beav. 284.

(c) 1 Ph. 501.

(d) Id. 209.

(e) 2 Ph. 484.

(f) 2 Ves. sen. 445.

(g) 1 My. & K. 88.

(h) Pt. I., Ch. 5 and 6; Pt. II.,  
Ch. 7.



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do anything which amounts to an act of ownership, it is a breach of their fiduciary duty as Conservators. The owner of the soil of the river has an interest to trespass on the soil; but the duty of the Conservator is to guard against any such trespass. It is therefore improbable that the office of Conservator should be intrusted to any party who had an interest in the soil of the river. [*Sir Richard Leigh's case*(a), and *The Attorney-General to the Prince of Wales v. St. Aubyn*(b), were also cited.]

Mr. Bethell, in reply, cited the cases of *In re St. Catharine Hall, Cambridge*(c), *Adams v. Fisher*(d), Wigram on Discovery(e), and *Smith v. Duke of Beaufort*(f); and in answer to an observation of the Lord Chancellor, that, if the Defendants denied the title of the Crown, he did not see how they could claim under it, stated, that the Defendants denied the right of the Crown as a matter of prerogative, inasmuch as the right to the soil and bed of navigable rivers had been only claimed by the Crown since the time of the reign of the Stuart family in this country; and that it was so claimed for the express purpose of preventing encroachments injurious to navigation.

The Statute of 17 Rich. II., c. 9, which annexed the duties of Conservator of the river *Thames* to the office of the chief magistrate of the corporation, was also adverted to in the reply.

On the subject of the costs, it was urged, that the present was just as much an information seeking to recover the private property of the Crown, as would be the case of a private individual; and the Crown, when suing in respect

(a) Dyer, 238.

(b) Wightwick, 180, 265.

(c) 1 Hall & T. 601.

(d) 3 My. & Cr. 526.

(e) Page 278.

(f) 1 Hare, 507; vide pp. 521, 522.

of private revenue, never received costs; that, in cases of charity, the costs were usually ordered to be paid by an unsuccessful Defendant, in order that the charity estate might not suffer; that it was in cases of established fraud and breaches of trust only that the *Attorney-General* had his costs given him; that, in the appeal of the Defendants in the present case, on demurrer, the House of Lords, in its judgment, dismissed the appeal, without costs; and in the Court below, the circumstance of the Defendants having made a deposit, on filing their exceptions, was improperly relied on in the judgment with reference to the question of costs, although the deposit by the Defendants was compulsory.

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The Act 46 Geo. III., c. 153, s. 2, was also referred to.

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The LORD CHANCELLOR:—

Dec. 17th.  
 Judgment.

The information in this case, which comes before me upon an appeal from the *Master of the Rolls*, who has held the answer to be insufficient, states the title of the Crown to the bed of the river *Thames*. It first of all states it as a general proposition, that the Crown is entitled to the land and soil under all navigable rivers. It then, as a distinct averment, states that her Majesty is, and has been from time immemorial, seised of the port and haven of *London*, and of the river *Thames*. It then states, as a reason, "the same being an arm of the sea, into which the sea always flowed and reflowed," and that it has always been navigable. There is therefore an averment of the general right from which the title to the soil in the particular river would flow. It also avers distinctly a right to the bed of the river *Thames*, stating, as a reason for it, that it is an arm of the sea, and a navigable river. The information then alleges that the Mayor and com-

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monalty have at all times been Conservators of the river; that the Corporation claim the freehold in the soil; and that, under that title, they have made certain grants, which are pretended to be supported by their claim to the freehold, but which the information alleges are bad in that respect, inasmuch as the Corporation have no freehold, and that such grants are injurious to the navigation of the *Thames*, and therefore obnoxious as nuisances, even supposing that the Corporation had any such freehold; that it would be their duty as Conservators not to permit encroachments, and which the information alleges to be injurious to the navigation of the *Thames*. Then comes that part of the information which is a perfectly legitimate mode of pleading,—something not immediately connected with the Plaintiff's title, but introduced for the purpose of meeting what is expected to be the Defendants' defence, viz. the allegation that the Defendants pretend that the Corporation had a grant of the bed of the river from the Crown; and in answer to their expected defence, the charge is, that there is no such grant of the freehold in any charter from the Crown to the Corporation. Another allegation is, that the Defendants pretend that they have some charters not containing the grant, but which recognise the grant; and in answer to such pretence it is charged that there is no charter recognising such grant. Another pretence is, that there is a grant from King Henry VI., which includes the soil; which is also met by a similar negative, to the effect that there is no such grant including the soil; or if there ever existed such a grant, the same was afterwards revoked. The information then states a pretence by the Defendants, that they have a title by immemorial possession, proved by certain acts of ownership; and then, in answer to that, there is a charge negating that allegation, and stating that the embankments are nuisances, and therefore objectionable, whatever might be the title of the Defendants; and then follows the usual

charge of the Defendants having in their possession papers and documents generally "relating to the matters aforesaid."

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To that information the Defendants have put in an answer, in which they deny the title of the Crown to the bed of the river *Thames*. They leave it as a matter of law whether any such general right exists in the Crown, as is claimed by the information; but they meet the fact of title to the land and soil of the river *Thames* by a direct negative; and they say that the Crown is not entitled, but that they the Defendants are entitled to the soil. They then admit that they have held the office of Conservator. Now it is quite clear that that is nothing more nor less than a denial of the Plaintiff's right. No doubt, if the Defendants be entitled, the Crown is not. It is a denial of the Plaintiff's right, setting up no other title in themselves than what may arise from possession; not deriving their title either from the Crown, or from any other source,—a negation of the Plaintiff's title not alleging a title in themselves in the soil and bed of the river *Thames*.

Now, from authority and universal practice, nothing is more clear than that a Plaintiff is entitled to discovery, not only of that which constitutes his own original title, but also a discovery for the purpose of repelling what he anticipates will be the defence. Since replications have been disused, the Plaintiff endeavours to obtain for himself what he before had got by a replication, by anticipating the defence, if he knows what it is, and alleging those facts which, if true, would shew that the defence is not available against him. An ordinary instance of that is a release, which the Plaintiff thinks he can impeach. It leaves untouched the question of the original title, but it anticipates that the Defendant will set up a release. If the Plaintiff is right in his supposition, he charges that

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which he endeavours to show would prevent that release from operating against him. But a more ordinary case, and one more adapted to the immediate circumstances of the present case, is, where a Plaintiff alleges the defence of purchase without notice, because in the case of the release, the Plaintiff generally,—always, in fact,—would have a further relief; first of all, he would get rid of the release, in order to let in the original title; but in the case of purchase without notice, as a matter of defence it is not for the purpose of claiming any additional relief, because if he can get rid of the defence of purchase without notice, he is let in at once to his original title; and if his original title be good, he has the benefit of the decree, and wants no additional decree, in consequence of his being able to beat down the defence which he expects. If the Plaintiff, therefore, anticipate the defence of a purchase for valuable consideration without notice, and makes the Defendant pretend that that is so, he then charges circumstances which would show that there was notice, and, in short, destroy the defence which he thinks will be set up.

Now that is the ordinary case where the Plaintiff can anticipate what defence will be actually set up. Probably a defence may be set up, which he cannot anticipate, of which he knows nothing; then there is certainly an universal practice, (whether it is supported by authority I shall consider presently,) which I can speak of from long experience, viz, to ask the Defendant what his defence is. It was said in argument, that discovery has only two objects: the one is for the Plaintiff to discover that which constitutes his own title; and the other is on the part of the Defendant, to set up what he relies upon and thinks it right to put in issue, in order to make his defence. But I apprehend that, on the part of the Plaintiff, there is a right in addition to that which is so stated in this proposition, viz. he is entitled to a discovery to repel the defence which

he expects will be set up. We have on this point the authority of Lord *Redesdale* and Vice-Chancellor *Wigram*. Lord *Redesdale* thus expresses it: "The Plaintiff has a right to the discovery of the case on which the Defendant relies, but not of the proofs" (a). He has a right to know what it is that the Defendant relies upon, in order that he may meet and prepare himself to encounter such defence, but he has no right to say, "How do you make out your case? How do you prove it? What is your evidence?" Vice-Chancellor *Wigram* rather quarrels with the generality of Lord *Redesdale's* proposition. He states, however, "that a Plaintiff is entitled to a discovery of the case on which the Defendant relies; that is, that the Plaintiff is entitled to know what the case is, admits of no doubt" (b). Nor does it admit of any doubt; it is the usual course in order to put in issue that which he means to prove; he puts it in issue, and therefore the Plaintiff is not under any difficulty about the matter being put in issue; but if he apprehends that the Defendant will not put it in issue, or if he wishes for more information about it, than he thinks he is likely to get without putting a further question, he has a right to know what the defence is. His right to the evidence upon which that defence is intended to be supported, is quite a different matter; and I apprehend that the language of Lord *Redesdale* has been rather misunderstood by Vice-Chancellor *Wigram*, because, when Lord *Redesdale* says, that the Plaintiff is entitled to a discovery of the case on which the Defendant relies, and in what way he makes it out, Lord *Redesdale* does not mean that he is entitled to all the evidence by which it is to be proved, but only that he has a right to know what the Defendant's case is. It is not enough, therefore, for a Defendant to say, "Because you, the Plaintiff, state that you are seised of the property,

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(a) Mitford's Pleadings, 9, 190, 5th edit. (b) Wigram on Discovery, 285.

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I say you are not, and I am." He must shew how he derives his right to the property; in short, he must shew that he has a title, which, if proved, would shew that he is entitled, and that the Plaintiff is not. It does not follow from that, that the Plaintiff is entitled to see the documents by which that title is proved. On the contrary, the authorities shew that he is not so entitled, and Lord *Redesdale* himself, in page 190(a), expressly draws that distinction; he says, the Plaintiff is not entitled to see the Defendant's proofs. We have it, therefore, on the authority of Lord *Redesdale*, that the Plaintiff is entitled to know what the Defendant's case is, and how he makes it out, but not to see the proofs by which that case is to be established.

It is said that the Statute of 21 James 1, c. 14, (being an Act to admit the subject to plead the general issue in informations of intrusion, brought on the behalf of the King's Majesty, and retain his possession till trial,) as, in fact, pleaded in the answer, gives a party against whom the Crown is litigating, an advantage different from that which belongs to every other Defendant. I do not at all so understand it. The object of that Statute was to put a party who was contesting with the Crown in the same situation as those who were contesting with any other Plaintiff. In equity, they always were on the same footing; and they are on the same footing now. There was no evil, therefore, to be remedied. There was, arising from technical reasoning, a great injury accruing to the Defendant in litigation with the Crown; the Crown's title was taken to be proved, unless a contrary title was set out and pleaded. That was a privilege which the Crown maintained against any party against whom it proceeded. But there has been no such privilege here, nor am I at all aware

(a) Mitford's Pleadings, 5th edit.

of there being any different rule, as far as this matter is concerned, in litigation between the Crown and a subject, and any two subjects. By "subject," I mean in the sense in which the Defendant is called upon to set out his answer.

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It is to be considered, then, first of all, what it is that these Defendants have set out. Have they set out any title at all? They have set out a negative of the Plaintiff's title, beyond all doubt, but they have not set out any distinct title in themselves, except that which arises from the absence of title in the Plaintiff. The Corporation are Conservators: that is not disputed; and that conservancy, it is said, is distinct from the title to the soil. No doubt it is; but it is not to be lost sight of, that though it is distinct from the title to the soil, yet it may give an opportunity for what might be very important acts of ownership, if they arose from a party who had not that access to the matters in question which the right to the conservancy gives to the Defendants; because, whether it is a due exercise of the conservancy, or whether it is not, beyond all doubt it gives a party an opportunity of pretence for acts which, without such a title to interfere with the jurisdiction over the *Thames*, could only be referred to an adverse title. An agent cannot very well get an adverse title, unless he can very distinctly shew that what he has done is in respect of title, and not in respect of his agency. That is exactly the situation in which the Defendants stand. In that view, in order hereafter to see how far those acts of agency negative the Plaintiff's title, for which purpose alone they could be used by shewing an adverse title in the Defendants, it never can be lost sight of that the Defendants are Conservators. It has been argued, that that is not so, and that, in point of fact, it is not the Corporation who are Conservators, but that it is the Lord Mayor who is Conservator. Now, how that may be upon the charters I do not inquire, but I find upon the



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answer, that there is a most distinct statement that the Defendants are Conservators themselves. The answer states that they exercise that jurisdiction by means of the Lord Mayor of *London*, acting for them, but that the right to the conservancy is in the Corporation. That is stated again and again in various passages; and if that is stated broader than the charters will warrant, it is not material to the present purpose; it being sufficient for the present purpose to shew that that is the title which the Defendants claim.

Now that the Plaintiff is entitled not only to a discovery of that which constitutes his title, as the title upon which he rests, but that he is entitled to a discovery of everything which may enable him to defeat the title which is expected to be set up against him, perhaps is in every draughtsman's knowledge; but it is well to see how it has been dealt with on decision. First of all, Lord *Redesdale*, in p. 9, expressly states it; and by Vice-Chancellor *Wigram*(a) in the page I have already mentioned it is stated. In *Jones v. Davis*(b), *Evans v. Harris*(c), and *Harland v. Emerson*(d), in the House of Lords, that is very distinctly stated, not only as no new decision, but as the recognised practice of the Court. And in *Stroud v. Deacon*(e), the bill charged that a deed, which was the Defendant's title, contained evidence which would defeat it; and the Defendant was compelled to answer. Now it is also perfectly clear, as has appeared in general practice, that if the Defendant pleads a deed of the Defendant's title, and withholds the deed, he cannot be compelled to produce it; because it is the Defendant's title and not the Plaintiff's; but if the Plaintiff alleges that that deed contains something which would shew that the Plaintiff is entitled, or supports the Plain-

(a) *Wigram on Discovery*, 2nd  
 edit., p. 285.  
 (b) 16 Ves. 262.

(c) 2 V. & B. 361.  
 (d) 8 Bligh, 62.  
 (e) 1 Ves. sen. 37.

tiff's title, the Defendant is bound to answer that question. He may not be bound to produce the deed, if he negatives the ground on which the Plaintiff claims the inspection of it; but then, although it is the Defendant's title, it is part of the Plaintiff's evidence, and may be the most important part of the Plaintiff's evidence, who may find in a deed constituting the Defendant's title a recognition of that which, if true, would supersede the title set up by a subsequent instrument. In the case to which I have referred, that point was distinctly raised; but there are several others where that point has arisen—one in particular—but the name of it I cannot now call to my recollection. It was the case of an original bill for tithes, and a cross bill; the original bill alleging, that certain receipts which belonged to the other party contained a recognition of a certain modus. The documents belonged to the opposite party and constituted the defence; but the Plaintiff alleged that they contained something which would be evidence of the Plaintiff's case; therefore the Court ordered that an answer must be made: and I believe in that case the production was ordered of that part of the book which contained that entry. In short, that general principle of the Court, in those particular cases to which I have referred, shews, with respect to the protection thrown around the Defendant, that the Defendant is not to be compelled to produce the evidence of his title, unless he thinks proper to produce it himself, and that, as a matter of pleading, he is not bound to produce it; but if he intends to take advantage of that protection, he is bound to negative that which the bill alleges such a document to contain, so far as it would be evidence of the Plaintiff's title. Because, whether it would be something to be found in the document itself, or the absence of the document, the circumstance alleged is alleged, not for the purpose of investigating what the Defendant may have to shew as proof of his title, but for the purpose of establishing or strengthening the Plaintiff's

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title, or of repelling that which he expects to be set up against his title, all of which are legitimate points of discovery by the information.

With these preliminary observations, and this reference to authority, so far as the rules and practice of this Court bear upon the particular question, I proceed to consider what these exceptions are,—what it is that the Defendants say they will not produce, and what the *Master of the Rolls* has decided they are bound to produce. I may first observe, that the case relied upon, of a party not being bound to produce evidence of his own title, has very little application to a case where the Defendants, in point of fact, have set up no title, but merely that which negatives the Plaintiff's title. Now, a great discussion has sometimes taken place as to the effect of a negative plea. Certainly, it is quite new to hear of a negative answer,—an answer which says, “I deny your title; you are not entitled to any further discovery.” The matter to be looked at is, as it appears by the case made by the Plaintiff: [Here his Lordship read the first exception down to the word “contrary.”] That is not the whole of it, but I take that branch first. If the Plaintiff be right in the general proposition, that all beds of all navigable rivers are vested in the Crown, it is obvious, if that be capable of being made out,—that is to say, if Lord *Hale* is right,—then the Defendants can only claim by some grant from the Crown. But the Defendants have not stated how they claim. Therefore, if they are entitled to go into any case at all upon these pleadings, on the subject of their title, they may be able to establish it, for anything I can tell, and may intend to establish it by producing some grant. But the Plaintiff says there is no grant which contains any grant of the soil; the question between the parties being, to whom the soil belongs. The Plaintiff says, “Charters have passed between the Crown and the Corporation of *London*, and

in none of those charters is there any grant of the soil; I only ask to see the charters; I do not ask what your defence may be; if you produce those charters, they may or may not operate for the advantage of your case; but it is part of my case, that, in all deeds which are now proveable between the parties, there is no grant of the soil of the bed of the River *Thames*." Is not that part of the Plaintiff's case? Is it not part of the case as to which he has a right to discovery, in order, when the matter comes to a hearing, to have an admission, if the Defendants do not produce any charter, that no charter contains any such grant? The absence of any trace of any such grant in any of the charters which have passed between the Crown and the Corporation of London is part of the Plaintiff's case; that falls distinctly within the principle of the cases to which I have already referred; and, quite unconnected, and independent of knowing what the defence is, the Plaintiff has a right to a discovery of that which those charters do or do not contain, so far as it constitutes his title.

Then comes the other part of the first interrogatory, about which I had more doubt, certainly, than about any other portion of the case: [Here his Lordship read the remaining part of the first exception.] Now that looks like an investigation of the Defendants' title; but it is not an investigation otherwise of the proof of that title, except as that constitutes the foundation of it. Do you claim under a charter, or do you not? The Defendants will not tell the Plaintiff what is the foundation of their title. The Defendants say, "I will not let you know; I have been in possession from time immemorial, and I deny that you are entitled." The Plaintiff says, "I am entitled, because I have been in possession from time immemorial." Now that comes exactly within what Lord *Redesdale* says, viz. that the Plaintiff is entitled to a discovery of the case upon which the Defendant relies, and is entitled to know what

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that case is. That is confirmed by Vice-Chancellor *Wigram*; but Lord *Redesdale* goes further, and adds, "and how he makes it out." If "how he makes it out" is to ask to see the charter, or to see the document, or to investigate the evidence by which he makes it out, that would clearly be a statement beyond what the rule of the Court would permit, and Lord *Redesdale* has expressed himself too largely; but, taking it in the restricted sense, it is strictly to know how it is you, the Defendants, claim this title—how it is you claim this property which the Plaintiff asserts to be still vested in the Crown. Although, therefore, that part of the exception comes near the mark, yet, to a certain extent, beyond all doubt the Plaintiff is entitled to an answer to it, because he is entitled to know what is the foundation and ground of the Defendants' title. That is the only part about which I had any doubt; the other exceptions, I think, will be found to fall within the same principle as that which I have already observed upon with reference to the first. [Here his Lordship read the interrogatory in the information, having reference to the second exception.] That is exactly the same exception, except that, instead of containing the grant, it refers to charters recognising the grant.

[Mr. *Bethell*.—Not "grant," my Lord, "immemorial right."]

THE LORD CHANCELLOR.—"And whether it is not true, that in no charter or charters granted to the City of *London* by any of her Majesty's predecessors has any immemorial right of the Mayor, commonalty, and citizens, to the ownership of the soil, bed, and shores of the river, as arising from some previous grant as aforesaid, been recognised."

[Mr. *Bethell*.—"The pretended right," my Lord, is an immemorial right.]

The LORD CHANCELLOR.—One is, you have no charter containing a grant—containing a right resting upon grant; the other is, you have no charter recognising a title. Take it as largely as you please, as far as the question is, as to the production of the documents, as to knowing whether the documents have any such contents or not, the two exceptions are precisely upon the same footing. [Here his Lordship read the interrogatory in the information having reference to the third exception.] That is a matter of fact. The history of that grant of King Henry VI. is not stated in the information, nor explained in the answer. The Defendants decline to answer upon that subject. The question being, whether, in point of fact, the charter of King Henry VI. is now in operation, and whether it has not been revoked. That is a fact, of course, very necessary, if there should be such a charter, which of itself would have any operation, to know whether the charter is now in force, and whether it has not been revoked. It is quite unconnected with the Defendants' title, so far at least as the Plaintiff is entitled to know whether that is in operation now, and whether, if ever it was in operation, it has not been revoked. [Here his Lordship read the interrogatory having reference to the fourth exception.] Here that has immediate reference to the two different positions in which the Defendants stand. They are Conservators, and they are (as they allege) owners of the soil. Beyond all doubt they are Conservators, and certain acts are admitted to have taken place; that is the ground of the Informant's complaint. The question is, whether those acts of ownership are referrible to the claim of title, or whether they are not to be explained by the control and dominion which, as Conservators, the Corporation have obtained over the bed and soil of the River *Thames*. How is that an investigation of the Defendants' title? It may be an idle question, and the answer to it is perfectly obvious. Of course, Defendants who set up that they

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have a title, will refer all acts of ownership to that title. But it will not follow, that, because it is not a question from which the Plaintiff will derive any benefit, the Defendants are entitled to refuse to answer it. It is not to be answered by the Corporation only, under their seal; the officer of the Corporation is made a party, and he may, when he comes to answer, have to consider whether he can safely say that those acts of ownership are referrible to the title altogether, or whether they may not be referred to the power and authority of the Corporation as Conservators. It is a fact which may be very important to the Plaintiff to know. If the Plaintiff should get an answer that those acts of ownership are not to be referred to the title, but that they are to be referred to the office of Conservator, no doubt a very great step would be made towards establishing the Plaintiff's title and negating the Defendants' title. The probability of getting such an answer is not in question; the point is, whether the question, if it is answered in a particular way, will not have that effect. It appears to me, therefore, that these exceptions are all, except the latter part of the first, distinctly within the rule which has been clearly established on so many authorities.

The fifth and last exception is a general inquiry as to the possession of documents. Now, in the first place, if the Defendants have not set up an adverse title, it is impossible for them to protect themselves by the rule of the Defendants not being compellable to make a discovery relative to what is their title, because that must be founded upon the Defendants having set up some title. I confess, that, looking very anxiously through these papers, I am very much inclined to think that there is no title set up in the sense and meaning of that term, when the Defendants are protected from discovery of that which relates to their title. I must see a title, and I must see some legal foundation

for a title, before I can admit that the Defendants are at liberty merely to deny the Plaintiff's title, or to endeavour to protect themselves from discovery, under an idea of that being their title, which is merely in fact a negation of the Informant's title. However, it is not necessary to come to any decision upon that point, because I think there is quite enough in the mode in which this interrogatory is answered, to shew that the Defendants are not entitled to the protection which they seek. They divide their answer into two parts, and endeavour to answer that part which they feel they are bound to answer, and to protect themselves against the other part. Now the Defendants say, in answer to the question last adverted to: "They admit that they have in their possession certain deeds, instruments, charters, letters-patent," and so on, "relating to and touching the said right and title of these Defendants to the freehold of the bed and soil of the said River *Thames*, and the enjoyment thereof, and which several deeds, instruments, charters, letters-patent, copies of charters, copies of letters-patent, leases, counterparts, entries, receipts," and so on, "evidence and shew, or tend to evidence and shew, such right and title of these Defendants as aforesaid; and all which said several deeds," &c., "these Defendants are advised and believe, form material parts of the evidence possessed by these Defendants, of their aforesaid right and title, and all which are intended to be made use of, and given in evidence by these Defendants, in support of their said right and title in this cause, and none of which said several charters, deeds, instruments, entries, and other documents, do or doth, as these Defendants are advised and believe, evidence or tend to shew or prove the intended and alleged right of the Crown, set up in the said information, nor would the Informant derive any proof in support of his case from the production of such charters, deeds, instruments, entries, or other documents, or any or

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either of them." Then they say they have other papers, which they do not seek to protect in the same way.

In the first place, the charge is, that such documents "relate to the matters aforesaid," that is to say, they relate to the subject-matter stated in the information. The Defendants take upon themselves to say, they believe they do not contain evidence of, or tend to shew the Plaintiff's title. Has a Defendant a right to do that? There is no allegation that they do not "relate to the matters aforesaid," nor is there any description of what they are, to enable the Court to judge of this matter, but the Defendants, being in possession of documents, and it being alleged by the information that they are documents "relating to the matters aforesaid," and which would, of course, entitle the Plaintiff to a list of them, (I do not say the production of them, but to know what they are), say, they do not believe that they would tend to shew or prove the Plaintiff's title. Certainly, if such a course were permitted, a Plaintiff would never get a discovery of any documents, because the mere pledging the party's belief that the documents do not contain evidence tending to prove the Plaintiff's case, would be ordinarily resorted to, and would leave the Plaintiff without any protection against it.

Now, a case very similar to the present is that of *Jerrard v. Saunders*(a). There the party endeavoured to protect himself from the discovery of certain deeds, by the statement that there was no notice. The Plaintiff alleged the existence of certain documents, and then stated certain facts amounting to a constructive notice of the Plaintiff's title. The Defendant merely answered that J. D., under whom he claimed, had no notice of the title set up by the Plaintiff. The Court said, it could not trust the Defendant

(a) 2 Ves. jun. 187.

to look at the deeds, and say whether they amounted to notice or not, the Defendant not denying that the documents related to the matter. The Plaintiff alleges that the documents contain notice, and the Defendants must either, in very distinct terms, negative the ground on which the Plaintiff asks for their production, or they must produce them, because the Plaintiff and the Court are to ascertain whether they do or do not relate to the matter. The Defendants are not to withhold the documents and all information, and answer to particular inquiries relating to their contents, and constitute themselves the judge in their own case, whether the documents will or will not prove the Plaintiff's case. If the Defendants have not set out a title, which appears to me to be the result of the pleadings in this case, then it is not necessary to resort to more authorities to ascertain whether there ought to be an answer to this last interrogatory or not. Even on the conclusion that they have set out a title, they are not entitled to protect themselves from the production of these documents, so as to entitle them to withhold all information as to what documents they are, or whether there are any such at all. I think, the Defendants not giving that answer to the information, this is an exception which the Plaintiff has sustained, and that the *Master of the Rolls* came to a right conclusion.

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I do not follow the whole of the reasoning of the *Master of the Rolls*; but, on looking through the pleadings, the grounds on which it strikes my mind that the discovery ought to be made, are so very clearly explained in the text books, and by the authorities, that it is unnecessary to advert to more than what I have already said, with respect to the united character of conservancy and the claim of title. It is obvious, that it is very difficult to reconcile the circumstance of those two things existing together, and that it entitles the Plaintiff to a very scrutinizing inquiry for the purpose of separating the acts which

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may be referred to one, or which may have arisen from the exercise of the other. It is impossible not to observe, that, if those two things are united in one and the same body, the interests of the public are not secured by it, because it is the duty of the Corporation, as Conservators, to prevent obstruction and the bed of the river being applied to profitable purposes, to the prejudice of the public; as owners of the soil, they no doubt would have an opportunity of doing that which might be very inconsistent with their duty as Conservators. And this information is not confined to the title arising from ownership of the soil, because it alleges, that if the Defendants are owners of the soil, and if, therefore, the Crown has not that authority and power which would arise from the general power and title of owners of the soil, then these acts are neglects or abuses of the power and jurisdiction of the Corporation as Conservators, and are to be treated as nuisances. However, that does not touch the matter under consideration upon these exceptions.

Upon these grounds, I find that the exceptions must be answered, and that the appeal from the *Master of the Rolls* must be dismissed.

Now comes the question of costs. The *Master of the Rolls* has dealt with these parties as two ordinary parties, and has given costs. On the other hand, it is said that costs are not to be given, because there is a rule, or at least a practice, that the *Attorney-General* neither receives nor pays costs. No doubt that rule is one which, in the case referred to by Mr. *Bethell*, was recognised by the House of Lords. Now I find that there were some instances with which the *Master of the Rolls* was furnished upon the subject. I have not the benefit of those references, and before I finally dispose of the matter of costs, I shall be glad to see what those authorities are, or any others which may

be furnished. I think it is extremely important that the rule should be understood; it seems to be very vague at present, and though the general rule is not disputed, the exceptions to it seem to me to lead to considerable difficulty on certain occasions. Now I do not lay down this as a rule, because I must have an opportunity of considering it further; but it is clear that the rule, such as it is, is considered as arising from the circumstance,—and this is imputed to have been said by me in the House of Lords,—viz that the Crown does not pay, and therefore does not receive costs. I did not put it so strongly as that. I think the expression was, that the Court would be very careful in making a party pay costs to one from whom it could not receive costs. Now, that may be very sound policy,—a very good reason,—provided that the case before the Court were one in which the Crown, if it had not had the privilege of the Sovereign, and had been an ordinary suitor, could have been called upon to pay costs. But it seems to have no application to a case where, under no circumstances, in that species of proceeding, could the Plaintiff be called upon to pay costs. Certainly that applies to the case in the House of Lords as much as it does here. A party appeals, either from the Master's decision, or, as in the present case, from the *Master of the Rolls'* decision. In the case of the demurrer, the party appealed to the House of Lords from the judgment of the Court below, dealing with that demurrer. In no case could the party Respondent be subject to costs; the Respondent having obtained a decision in his favour. The party appealing may be liable to costs, if the Court thinks that it is a case in which he ought to pay costs, if he fail. In that particular proceeding, the Appellant is not to be protected upon the ground, that, between two subjects, he might have to receive costs, and therefore, as he cannot receive costs, he is not to pay them: in a proceeding of that sort he never could have to receive costs. If the rule, therefore,

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rests upon that distinction,—which struck my mind at the moment, for it was at the moment when the judgment was in actual course of being given, that the question of costs arose, and no opportunity, therefore, existed of considering the principle upon which the rule is founded,—it does appear to me, that if the rule is to exist, it ought in justice only to apply to cases, where, according to the merits, and the result of the discussion, the costs would be in the breast of the Court, either for the Plaintiff or for the Defendant; the Plaintiff may get his decree with costs, or the bill may be dismissed with costs: it depends upon the result of the judgment of the Court, whether one party or the other is to bear costs, or to receive costs, or to have no costs awarded at all. But in the case of an appeal of this kind, the party Respondent being in possession of the judgment of the Court, is therefore, under no circumstances, liable to pay costs, although he may be entitled to receive them, if it is considered that the appeal ought not to have been brought forward. The same occurred before the *Master of the Rolls*, but he does not seem to have rested upon that principle, though he did rest his opinion a good deal upon the fact of a deposit; but I do not think that that much aids the matter, because it is a general rule, and an exception is not made, and all we can say is, that if the rule be, as contended for on the part of the Defendants, there ought to be an exception to that rule as to a deposit; and where the Crown is a party, there ought not to be a deposit required. But the fact that the Crown could not, and if it had not had the privilege, would not have been called upon in that proceeding to pay costs, does seem to distinguish the case, and to take it out of the principle upon which, when a subject is litigating with the Crown, the rule seems to be founded. However, before I dispose of the question of costs, if there were such a list as I have referred to, made out for the benefit and instruction of the *Master of the Rolls*, I should

be very glad to have it, if Counsel are able to procure it, and if not, I must desire a search to be made for the authorities upon that subject, because it is a point of such frequent occurrence that it ought to be, if possible, settled.

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The LORD CHANCELLOR:—

This case stood over for the purpose of my making some inquiries as to the course of proceeding with regard to costs, where the *Attorney-General* is a party. I have had an opportunity of looking at a variety of instances, which clearly shew, that, although there may be and has been a generally received opinion that the *Attorney-General* neither pays nor receives costs, it is open to a variety of exceptions, and there are many cases to be found in which that rule has not been acted upon. There does not, however, appear to have been a very general practice or understanding upon the subject.

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Two cases in the House of Lords were referred to. If they establish the rule, no doubt it is binding on this Court, and there would be no option but to follow the rule so laid down; but there is always a distinction to be borne in mind between the order of the House of Lords itself, and the reason given by the member of the House who delivers its judgment.

In the present case, in a former stage of it, when I was present, and in a case from Scotland, which occurred during the last session of Parliament, and at the argument of which I was not present, the order of the House of Lords seems to have been that there should be no costs. There is no decision laying down the principle why the order of the House of Lords in those cases was so framed, or why the House adopted that course. In other cases the House

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of Lords has given the *Attorney-General* costs. One case in particular has been called to my attention, viz *The Skinners' Company v. The Irish Society*, where the *Attorney-General* was a Defendant, and the bill was dismissed at the Rolls with costs (a). That decree was the subject of appeal to the House of Lords, and was wholly affirmed (b).

During the argument of this case in the House of Lords on the Defendants' demurrer (c) I was present, and what then took place, according to my own recollection, is, that the question as to costs was started upon me as I was delivering the judgment of the House upon the principal subject-matter; and it was called to my attention that the *Attorney-General* was a party. The rule was also referred to of the *Attorney-General* neither receiving nor paying costs, and the House acted upon my individual advice not to give costs in that particular case. This was done without any time being taken for consideration of the question of costs; there was none allowed for argument on the subject; and I think there was an error in the advice which I then gave to the House of Lords upon that subject. The order of the House merely was, that the decision be affirmed without costs.

It is quite true that justice requires that a rule which has been so often acted upon and so generally received as an axiom, should not be lost sight of, because nothing would be more unjust than that, in a contest in which the *Attorney-General* could not be made to pay costs, he should be, under any circumstances, entitled to receive costs. Such a course would not put the parties at all upon equal terms. As far as regards a suitor, to whom the *Attorney-General* may be opposed, being relieved from any injustice arising from the position of the *Attorney-General* coming into Court

(a) 7 Beav. 642.

(b) 12 Cl. & Fin. 490.

(c) *The Corporation of London*

v. *Attorney-General*, 1 House of Lords Cases, 440.

as a suitor, the Court might have the power, if the *Attorney-General* were a private party, to make him pay costs; and therefore says to the suitor, "As you cannot receive costs, you shall not pay costs." But that rule ought not to be extended beyond what is reasonable; it ought not to be extended beyond the cases in which the *Attorney-General*, if he were not Attorney-General, but suing as an individual, or any other individual suing in his place, would be liable to pay costs; and the rule, instead of being that the *Attorney-General* neither receives nor pays costs, ought rather to be, that, where the *Attorney-General* could be called upon to pay costs, had he been a private individual, then he ought not to receive costs. That would apply to the hearing of the cause. At the hearing of the cause, it depends entirely upon what transpires in the cause—upon what the case is, and what the opinion of the Court is on the facts disclosed in the cause—whether the Plaintiff or Defendant is to pay costs. But where one party is in possession of the judgment, and the opposite party comes and questions that judgment, then it is not in the discretion of the Court. The party in possession of the judgment never is made to pay costs. He has obtained the judgment of the Court, and is entitled to defend that judgment; and although the Court of Appeal, or the Court, upon a rehearing, or the Court, upon hearing exceptions to the Master's report (which is the same thing), may be of opinion that the judgment pronounced is not right, and therefore alters it, the party who merely supports what a Court of competent jurisdiction has already determined, is never in that contest made to pay costs. If the party be dissatisfied with the judgment below, and endeavours to obtain a variation of it, and fails to do so, he is generally made to pay costs, not necessarily, though generally; but the party in possession of the judgment below, is never made to pay costs.

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The reason, therefore, of the rule does not apply where there is an appeal against a judgment already pronounced.



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All that, no doubt, tends to prove what I admit was an error in the House of Lords in the view which I took of the matter at the time when the present case was before the House upon the demurrer, and where the party questioning the decision of the Court below failed. I do not think that the principle of the rule applies to that case. Here, precisely the same thing occurs. The Master expresses an opinion—the party against whom the Master expresses that opinion complains of it—the *Master of the Rolls* is of opinion that there is no ground for the complaint, and therefore gives the costs of supporting the Master's conclusion. That is a case in which the *Attorney-General* could not have been made to pay costs, because he had the judgment of the Court in his favour. So the parties come here; their position, therefore, is the same; the party in possession of the judgment can never be called upon to pay costs; there is, therefore, no grievance to be complained of by the opposite party upon appeal.

I have consulted with the best authorities upon the subject, and we are all of opinion that it would be a very wholesome rule—not a rule without exception, because it is all matter of discussion, to a certain extent, but as a general rule, that the principle that the *Attorney-General* never receives nor pays costs may be considered as modified in this way:—the *Attorney-General* never receives costs in a contest in which he could have been called upon to pay them had he been a private individual. That will give all the protection to the suitor opposed to the *Attorney-General*, which is in justice due to him; and, at the same time, will discourage what I think is too often the case, namely, carrying on an unnecessary and improper litigation in consequence of that rule.

Upon these grounds I think the *Master of the Rolls* was right; and the appeal must, therefore, be dismissed generally, including the question of costs.

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## CATON v. RIDEOUT.

Dec. 14th.

BY the decree of the *Lord Chancellor*, on further directions, dated the 5th August, 1848, it was (inter alia) declared that the Plaintiff, as a specialty creditor on the estate of the testator *John Rideout*, was entitled to the arrears of an annuity of 56*l.*, and the future payments thereof, during the joint lives of the Defendant *Frances Rideout*, widow, and the Plaintiff; and a reference was directed to the Master to take an account of what was due to the Plaintiff in respect thereof, and also the usual accounts of the Defendant's receipts and payments in respect of the testator's personal estate and effects, and of his outstanding estate, and of his debts, with a direction for the Master to make all just allowances. The Master, by his report of the 25th of June, 1849, found that no person had come in before him to prove any debt against the testator's estate; and that the Defendant had received the sum of 1883*l.* 8*s.*, part of the testator's personal estate; and that there was due from her, in respect of her receipts and payments on account of the testator's estate, a sum of 966*l.* 6*s.* 4*d.* The former amount comprised a sum of 555*l.* 8*s.* 10*d.*, a balance of cash remaining in the hands of Messrs. *Child & Co.*, bankers, on a mixed and general account of the testator at the time of his death. The Master had charged the De-

The Plaintiff filed his bill against the Defendant, the sole executrix of her deceased husband *John Rideout*. By the decree the Plaintiff was declared a specialty creditor of the testator, and a reference was directed to take an account of what was due to him, accompanied by the ordinary directions contained in a creditors' suit. The Defendant, under a settlement executed on her marriage with the testator, was entitled for her separate use to the dividends on a sum of 3*l.* per cent. Consols. The Defendant's trustees, through the medium of their bankers, received the

dividends as the same accrued due, for a number of years, down to the date of the husband's death, and paid the same from time to time to the husband's bankers, to his account, the wife never asserting her right to receive the separate benefit thereof. The Master, by his report, found that the Defendant had received a considerable sum of money, part of the testator's personal estate, including a sum of 555*l.*, the amount of the balance in the hands of the testator's bankers at the time of his decease:—*Held*, notwithstanding the testator was one of the three trustees under the wife's settlement, that the balance was part of the testator's personal estate, and not the separate estate of the Defendant.

*Held* also, that the Defendant, although executrix and universal legatee of the testator, was not entitled under the decree to exhibit interrogatories before the Master for the examination of the Plaintiff, who was the only creditor of the testator, as to parts of the testator's personal estate which had come to his possession; but liberty was given to the Defendant to raise the case for further inquiry, by petition to be brought on when the other exceptions to the report, which had not been discussed, were set down for hearing.

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*Statement.*

defendant with the appraised value of certain volumes of books, part of the testator's estate, some of which had been appropriated by the Plaintiff to his own use. The Master had also disallowed various payments made by the Defendant, which the Defendant insisted he ought to have allowed to her. The Master refused to allow the Defendant to file or exhibit any interrogatories for the examination of the Plaintiff as to the printed books belonging to the testator's estate, which were delivered to or came into the possession of the Plaintiff, or as to the plate or plated articles of which the testator died possessed, or as to whether some part of the plate and plated articles were not purchased out of monies belonging to the separate estate of the Defendant, or as to the directions and instructions given by the Plaintiff respecting the funeral of the testator, and the monument erected to his memory, or as to the monies received by the Plaintiff belonging to the testator's estate. The Defendant filed twenty-eight exceptions to the Master's report; the first of which had reference to the sum of 555*l.* 8*s.* 10*d.*, and the last five to the disallowance of the proposed interrogatories for the examination of the Plaintiff as to the matters above referred to.

For a period of fourteen years ending with the year 1838, when the testator died, Messrs. *Currie*, the bankers of the trustees of the Defendant under her marriage settlement, received the half-yearly dividends of a sum of stock, to which the Defendant was entitled for her separate use, and regularly paid over the same under powers of attorney to Messrs. *Child*, the private bankers of the testator, who dealt with the same as his own. The Defendant insisted, that the sum of 555*l.* 8*s.* 10*d.* was part of her separate estate, and was the balance of dividends settled on her for her separate use, and which had been received by the testator from time to time on her behalf, and as her agent, the testator being one of the Defendant's trustees under her

settlement. The Defendant, in her affidavit carried in before the Master, stated, that the testator received the dividends for her separate use.

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On the argument, before Vice-Chancellor *Knight Bruce*, on exceptions and second further directions, on the 21st of July, 1849, the first exception was allowed; and on that and the other exceptions it was referred back to the Master to review his report. From that order the Plaintiff appealed.

Mr. *Rolt* and Mr. *Greene*, in support of the appeal, with reference to the first exception, having stated the facts,

Argument.

The LORD CHANCELLOR observed, that the object of the Defendant seemed to be to recover back, after her husband's death, sums of money which he had been in the habit of regularly receiving during his lifetime, without any objection on her part, and called upon the Counsel for the Respondent to support the decision of the Court below, on the first exception; when

Mr. *J. Parker* and Mr. *Miller* contended, that, in dealings between husband and wife the *onus probandi* was on the husband, or his creditors after his death, to satisfy the Court that the husband had dealt with the wife's separate estate with her consent; that the present case was not one purely between husband and wife, because the testator was one of the wife's trustees under her marriage settlement, and had a legal right to receive the dividends settled to the wife's separate use under the joint power of attorney that had been previously given: *Rich v. Cockell* (a).

[The LORD CHANCELLOR.—That was the case of a legacy

(a) 9 Ves. 369.

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 —  
*Argument.*

which might or might not have been improperly paid; the fact, in the present case, of the husband having from time to time received the dividends, and dealt with the same as under his own control, is strong evidence of the wife's consent; and the question is, can I receive the evidence of the wife? If not, can you repel the presumption that arises from the facts disclosed?]

The Defendant does not seek any account of the dividends that have been expended during the husband's lifetime, but only claims to retain as her property the amount in the hands of the husband's bankers at the time of his death.

[*Milnes v. Busk* (a), *Pawlet v. Delaval* (b), and *Parkes v. White* (c) were also referred to on behalf of the Respondent.]

Mr. *Rolt* was heard in reply.

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With reference to the exceptions which had relation to the Master's refusal to allow the Defendant to exhibit interrogatories for the Plaintiff's examination, as to the books, part of the testator's estate, which had come to the Plaintiff's possession, and as to the plate, mourning, &c., it appeared from an affidavit of the Plaintiff, that the Defendant, after the testator's death, had given the Plaintiff certain books, not exceeding in value the sum of 5*l*.; but it was contended, on his behalf, that he was merely a creditor of the testator; that the decree contained no direction to take any account against him; that the several matters had been discussed before the Master on affidavit; that no special case existed to justify the Master in settling the interrogatories that had been proposed to be exhibited for the Plaintiff's examination, and

(a) 2 Ves. jun. 488. (b) 2 Ves. jun. 499. (c) 11 Ves. 209.

that the proposed interrogatories, if allowed, would have been irrelevant to the account and inquiry directed by the decree to be taken, which was not against the Plaintiff, or touching the amount or reduction of his debt, but solely against the Defendant, as executrix of the testator. The case of *The East India Company v. Keighley (a)* was cited for the Plaintiff.

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—  
*Argument.*

On the part of the Defendant (the Respondent) it was insisted that the fact of the discussion of the matters in question before the Master on affidavit did not preclude the Defendant from afterwards exhibiting the proposed interrogatories for the Plaintiff's examination before the Master, and that the affidavits disclosed satisfactory evidence that much of the expenditure of the testator's estate which had been disallowed by the Master was incurred with the sanction and acquiescence of the Plaintiff, and in several instances under his management.

In reply it was urged, that to justify the exceptions to the report, there ought to have been either special inquiries directed by the decree, or a petition presented by the Defendant, making a case for such inquiries.

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The LORD CHANCELLOR:—

As to the delay, it is clear, much time would have been saved by the Plaintiff if he had answered the interrogatories instead of inducing the Master to exclude them. If the delay be injurious to him, he has to thank himself for it. If he have nothing to conceal, why not have answered the interrogatories? That, however, is not the point for decision. There are matters here which must be inquired into, and it will be for the Plaintiff to consider

*Judgment.*

(a) 4 Madd. 16; vide p. 38.

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—  
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whether it is worth while to pursue this contest before the Court can dispose of the fund. The only doubt I have is, whether these proceedings are in a state to justify the Master in allowing the interrogatories, or whether the parties ought not to be put to present a petition, which would add still more to the delay, as well as the expenses already incurred. It cannot answer the purpose of any party to commence a new proceeding for the purpose of pursuing the interrogatories, because, according to the case made, the amount only is disputed, and not the position of the parties. Although the inquiry directed is as to creditors generally, the Plaintiff turns out to be the sole creditor. The Defendant is entitled to the residue of the estate, as the personal representative, and the contest in taking the account is exclusively between the Plaintiff and the Defendant. What the Defendant is bound to account for is to go into the Plaintiff's pocket, and it therefore becomes a matter of contest between those two individuals, which of them is entitled to a certain sum, which may or may not be established against the other.

The proposition stated by the Defendant, the accounting party, is, that although the Defendant might be accountable for the property to any other creditor, the Plaintiff is now suing for himself only, as appears from the report, and has, in fact, got possession of part of the property, with which he seeks to charge the Defendant. Nothing would be more unjust than that should be so. If this turn out to be the fact, it will be a proceeding which the Plaintiff will regret to find established against him. The Plaintiff is asking the Defendant over again, in her character of representative, to account to him, as sole creditor, for property which he has actually received from her, and whether it be 5*l*. or 500*l*., it makes no difference in principle. Now, what becomes of the account of money received and paid I do not know, unless it can be shewn

that she is charged with a sum—a balance which the Plaintiff is in fact the party to account for. I presume some such case as that, the Defendant will make out, viz. that she is charged with the result of certain receipts and payments which, in point of fact, were made by the Plaintiff as her agent, and that he, therefore, being the sole party claiming against the estate, ought not to call upon her to pay an apparent balance, which is not a real balance, he having that balance in his own hands. Those are propositions which, whether they are capable of being established or not, the Court must have ascertained before it can take from the Defendant, for the benefit of the Plaintiff, an amount of property which the Plaintiff has already (as is alleged) had the benefit of, and which he seeks to have twice over, once as creditor, and secondly as donee or agent, or in whatever character he may have got the money into his hands. It is quite clear I must either permit this inquiry to proceed, or I must give the party an opportunity of raising the case by petition.

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[On Mr. *Rolt* asking whether his Lordship intended that the application for an inquiry should be made to his Lordship, the *Lord Chancellor* expressed his dissent, and added, that the Master had rejected the interrogatories, and, in his opinion, was right at present in doing so.]

THE LORD CHANCELLOR.—The matter then came before the *Vice-Chancellor*, who thought the Master ought to have received the interrogatories; with that I cannot agree. The case made was, there was no right to exhibit interrogatories; at the same time, I think enough appears in the proceedings before the Master, to lead me to say, as the matter at present stands, that there is ground for further inquiry, and justice cannot be done without it; and, although differing from the *Vice-Chancellor*, and agreeing with the Master as it now stands, before the Court acts upon the re-



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port, I think the Defendant ought to have an opportunity of applying for a special inquiry that will give the result,—such opportunity to be taken advantage of within a limited time.

[*Mr. Rolt.*—Your Lordship's order will be to overrule the first and last five exceptions and discharge the *Vice-Chancellor's* order, as far as regards the exceptions, and the other exceptions will come on again before his Honor the *Vice-Chancellor*, and then it will be without prejudice to any application the Defendant may make for any special inquiry touching the matters referred to in the interrogatories, provided the Defendant makes the application within a limited time—that is the effect of your Lordship's decision.]

The LORD CHANCELLOR.—The better time to give the Defendant that opportunity will be, when the case comes on before the *Vice-Chancellor*. All I have to do now, is to dispose of the case upon the petition of appeal, and the question as to the form of the interrogatories. I think the *Vice-Chancellor* did not arrive at a correct conclusion as to the sum of 555*l.* 8*s.* 10*d.*, or as to the last five exceptions; and I must allow the appeal accordingly. Then the other exceptions which are not now touched upon, will come on again before the *Vice-Chancellor*; and upon that occasion the Defendant will have an opportunity of making a special case with regard to the further inquiry before the Master, if she be so advised; and liberty is accordingly given to the Defendant, when the exceptions are again brought on, to make such application as she may be advised as to any further inquiry before the Master.

The question as to the sum of 555*l.* 8*s.* 10*d.*, depends entirely upon the force of the evidence that is before me, upon which alone I can proceed. A wife, of course,

having property settled for her separate use, is entitled to deal with the money as she pleases. If she directly authorises the same to be paid to her husband, of course he is entitled to receive it, and she can never recall it. I do not consider that any direct authority has been produced which affects the present case<sup>(a)</sup>. If the husband and wife for a long time dealt together in such a way as amounted to evidence of what they must have agreed upon, namely, that the wife's separate income should come to the hands of her husband, and be made use of by him for their joint purposes (they living together), it is likely that the husband would be permitted to receive it, and that is evidence of a direction on her part that the separate income that she otherwise would be entitled to, should be received by him. There is a sum of money here, which, during the coverture, became payable to the wife; undoubtedly she had a right to say to the trustees, "You must pay the money into my hands, or according to my special directions." Instead of pursuing that course, the custom that prevailed for a number of years continued to operate, and the money was received by the trustees, or rather under their power of attorney, by the bankers, Messrs. *Currie*, who received it most probably by the authority of the trustees—by their act unquestionably—and they paid it over (as they had always done the earlier portions of her income) to the bankers, Messrs. *Child*, not to her account at all, but to the account of the husband; and the practice is proved to be, that at all times the account at Messrs. *Child's* was under the legal control of the husband; and I must assume it to have been so with the consent and concurrence of the wife, who, for a number of years, permitted her husband so to deal with that fund; and the evidence shews that she never asserted her right to receive the separate benefit of it. The money now in question

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(a) The case of *Beresford v. The Archbishop of Armagh*, 13 Sim. 643, is strongly confirmatory of the principle on which the *Lord Chancellor* decided the principal case.

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 —  
*Judgment.*

was paid in under the circumstances I have mentioned, and I consider the case the same as if she had specifically authorised that mode of payment; and the *Vice-Chancellor* does not seem to have questioned the rule of law, although it has been questioned at the bar. He put it totally upon a different ground; and the question is, whether that ground is capable of being maintained according to the evidence as it stands. The Plaintiff says, "Suppose the money had been paid to the husband, or paid to anybody for the husband, it having come to his hands, you, the Defendant, could not recover it." It was argued at the bar, on behalf of the Defendant, that she might recover it, provided that she could ear-mark it; and it was contended, that even if it had been invested in the funds, if the husband had been in the habit of laying out what he received in the funds, and invested it in his own name, it might be recalled. But the *Vice-Chancellor* put the case thus: viz. that the husband happened to be trustee, and therefore it never got out of the hands of the trustee, and it was therefore in the hands of a trustee as the wife's separate property. Now, when I have recourse to the evidence, I find that there is a practice of years against that. I find the money was paid into the bank of Messrs. *Child*; and being in Messrs. *Child's* hands in the husband's name, it is not, whilst there, considered as trust-money, but as a payment to him, otherwise he would not have been permitted to exercise the control over it which he did. The husband drew upon the fund as he required it for particular purposes, from day to day. He lived in the country, and he was in the habit of employing country bankers. He supplied the funds to the bankers, Messrs. *Child*, with directions to them to transmit the same to the country bankers. Was the money at the bank of Messrs. *Child* in his hands as husband, or as trustee? First of all, it ought not to have got into his single hands as trustee at all, but it ought to have been under the control of himself and the other trustees. In that character Messrs. *Currie* received it, and,

with the joint concurrence of both husband and wife, Messrs. *Currie* paid it to Messrs. *Child* to the husband's account; that is to say, to Messrs. *Child* to his separate account; and the wife, knowing that, for years permitted her husband to deal with it, without any interruption on her part. Well, then, must I not consider the funds in Messrs. *Child's* bank as being there on account of the husband, with the knowledge, acquiescence, and concurrence of the wife? As the evidence stands, I must consider the payments of the dividends as actual payments to the individual as the husband, and not as trustee. The only evidence of dealing is on one side: there is none on the other, as I of course reject the two affidavits of the Defendant and the Plaintiff's wife. Having come to that conclusion, the only remaining point is, whether the money was in the hands of Messrs. *Child*, on account of the husband, in his character of husband, or in his character of trustee; and upon that subject the result is, upon the rule which was acquiesced in in the Court below, that separate money of the wife, paid to the husband with her concurrence, or by her direct authority, (to be inferred from the mode of dealing between them,) cannot be recalled. If I were to hold the contrary, I do not know to what extent it would go. In ninety-nine cases out of a hundred, separate property is introduced as a protection against the wife being wronged, but not if all things go right. In ninety-nine cases out of a hundred there is no distinction made; it does not become separate property; it is used as a common fund of the family, and in that way, and very naturally, the common fund is placed under the control and management of the husband; and if you once give way to the idea that the wife by herself, or by those who represent her, may call upon the estate of the husband, or the husband himself, to repay the money as far as they can trace it, you cannot tell what confusion you might introduce into a family; you might have the wife come and say, "You have bought so much stock with my separate property;" and, according

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to the argument urged before me, she might be at liberty to say that, when there is a positive proof of appointment in favour of the husband. The habit of dealing between the husband and wife is proper evidence to shew her acquiescence and concurrence. In this case the evidence is entirely one way. Consequently the Master was right, and the allowance of this exception to his report must be overruled.

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18th, & 22nd.

## RACKHAM v. SIDDALL.

W. S. by will gave all his real estates unto and to the use of W. T., his heirs and assigns, upon trust out of the rents to pay to

*M. S.*, during her life, an annuity of 150*l.*, and to apply the surplus rents, after payment of the annuity and such other charges and expenses as thereafter mentioned, unto the testator's daughter *C. N.*, wife of *B. N.*, during the life of *M. S.*; and after the decease of *M. S.*, the testator directed that the estates should remain unto *W. T.*, his heirs and assigns, to the use of *C. N.* for her life, with remainder to the use of *W. T.*, his heirs and assigns, during *C. N.*'s life, in trust to preserve, &c.; and after the decease of *C. N.*, to the use of *B. N.* for life, with remainder to the use of *W. T.*, his heirs and assigns, during the life of *B. N.*, in trust, &c.; and after the decease of *B. N.*, in case he should survive *C. N.*, to the use of all the children of the body of *C. N.* to be begotten, as tenants in common; and there was a proviso that, in case *B. N.* and *C.* his wife, or the survivor, should desire a sale of the estates, it should be lawful for *W. T.*, his heirs or assigns, to sell the same, with the consent of *B. N.* and *C.* his wife, and sign and give receipts for the purchase-moneys, which were to be effectual discharges to the purchasers. The will contained a direction to lay out the sale monies in the purchase of other hereditaments, or upon good security at interest, in the name of *W. T.*; and the hereditaments to be purchased were directed to be conveyed to *W. T.*, his heirs and assigns, to the uses before mentioned; the interest of the sale monies was directed to be paid to the parties entitled to the rents, and the principal money, in case of no purchase being made, was directed to be divided amongst *C. N.*'s children equally, at twenty-one. After the death of *W. T.*, *G. T.*, the sole devisee of his estates, subject to a gross payment of 50*l.* thereof, joined with *B. N.* and *C.* his wife in the sale and conveyance of *W. S.*'s estates to a purchaser thereof, and *B. N.* was allowed to receive the purchase-money, and gave to *G. T.* a bond of indemnity to save her harmless in respect of such receipt. *C. N.* survived her husband *B. N.* several years, and also *G. T.*, who by her will appointed *C. S.* her executrix. On bill filed by the executors of *C. N.* and the assignees of her life-interest, against *C. S.* and the other parties interested in the purchase-moneys:—*Held*, that the trust estates under the will of *W. S.* were vested in *W. T.*, and that, in the absence of any act of *C. N.* whilst *vis juris*, affecting her rights as tenant for life, the Plaintiffs were entitled to a decree for an account against *C. S.*, the legal personal representative of *G. T.*, to the extent of *C. N.*'s life interest in, but not to any declaration that the estate of *G. T.* was liable to account for the principal of the sale monies.

*Held*, that if an inquiry had not been already directed to that effect, in a previous suit instituted for administering *B. N.*'s estate, an inquiry would have been directed as against the *cestuis que trust* under *B. N.*'s will, whether the sale monies received by *B. N.* were or not laid out by him in the purchase of other estates, there being an allegation to that effect in the answer of *C. S.*

*Held* also, that the Defendants, the parties in remainder under the will of *W. S.*, having adopted and endeavoured to reap the benefit of the present suit, and taking nothing from it, were not entitled to their costs.

the rents and profits of the same estates, to pay unto the said testator's wife, *Mary Spencer*, during her life, one annuity of 150*l.*, and to apply the surplus of the said rents and profits, after payment of the said annuity, and such other charges and expenses as thereafter mentioned, unto the said testator's daughter *Catherine Norton*, then the wife and afterwards the widow of *Benjamin Norton*, her executors, administrators, and assigns, during the life of his said wife *Mary Spencer*; and after the decease of his said wife, the said *William Spencer* directed that the said estates thereinbefore devised should remain unto the said *W. Thompson*, his heirs and assigns, to the use of the said *C. Norton* and her assigns for her life, without impeachment of waste, with remainder to the use of the said *W. Thompson*, his heirs and assigns during her life, in trust to support the contingent remainders thereafter limited from being destroyed; and from and after the decease of the said *C. Norton*, to the use of the said *B. Norton* and his assigns during his natural life, without impeachment of waste, with remainder to the use of the said *W. Thompson*, his heirs and assigns, during the life of the said *B. Norton*, in trust to preserve the contingent remainders thereafter limited from being destroyed; and after the decease of the said *B. Norton*, in case he should survive the said *C. Norton*, to the use of all and every the child and children of the body of the said *C. Norton* lawfully begotten or to be begotten, in equal shares, as tenants in common in tail, with cross remainders between or amongst them in tail, with the ultimate remainder to the said testator's cousin *Matthew Spencer* in fee; and the said will contained a proviso, that, in case the said *B. Norton* and the said *C. Norton*, or the survivor of them, should be desirous that the whole or any part of the said estates thereby devised should be sold, then that it should be lawful for the said *W. Thompson*, his heirs or assigns, to sell and dispose of the same by and with the consent and approbation

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of the said *B. Norton* and *C. Norton*, or the survivor of them; and after payment of the money to arise by the sale of the whole or any part of the said estates, to sign and give proper receipts for the money for which the same should be sold, which receipts should be sufficient discharges to the purchaser or purchasers for so much of the purchase-money as should be therein expressed to be received; and such purchaser or purchasers should not afterwards be answerable for any loss, misapplication, or non-application of such purchase-money or any part thereof, and should and might hold and enjoy such parts of the said estates, purchased by him, her, or them, freed and discharged from the uses, trusts, limitations, and powers thereby declared concerning the same: and the testator directed that the money to be raised by such sale should be laid out either in the purchase of other hereditaments, or upon good and sufficient security at interest, in the name of his said trustee; and that the hereditaments to be purchased should be conveyed unto the said *W. Thompson* and his heirs and assigns, to the uses thereinbefore declared concerning his said estates thereby devised, or such of them as should be then subsisting; and that the interest and produce of the money to be placed out at interest should be paid by his said trustee to the person or persons who for the time being would have been entitled to receive the rents and profits of his said estates, in case the same had not been sold; and he directed that the principal money so to be placed out as aforesaid should, after the decease of the said *B. Norton* and *C. Norton*, be equally divided amongst all such children as the said *C. Norton* might leave at her decease, the shares of such children respectively to be a vested interest, and to be paid to her, him, or them on their severally attaining the age of twenty-one years.

*B. Norton* and *Catherine* his wife, the testator's executors, proved his will shortly after his decease, in the

year 1799; *C. Norton*, who was the heiress-at-law of the testator, left five children, all of whom attained twenty-one years of age, and were represented by different parties to the suit. In the year 1800, *W. Thompson*, at the request of *B. Norton* and his wife, sold part of the devised estates, and allowed the purchase-monies to be paid to *B. Norton*. After the death of *W. Thompson*, and in the year 1807, the devised estates remaining unsold, were sold by *G. Thompson*, who was then the sister, and afterwards, in 1821, became heiress-at-law of *W. Thompson*. She was also the sole devisee in fee of his real estates, subject to a gross payment thereof of 50*l.* to *John Watson*. *G. Thompson* allowed *B. Norton* to receive the purchase-monies thereof, amounting to 6300*l.*, and he, together with *Francis Norton*, his surety, executed in her favour a bond of indemnity, to protect her from the consequences of such a course of proceeding. *G. Thompson* signed a receipt for the purchase-monies, and joined in the conveyance of the devised estates to the purchasers, and was therein described as the devisee in fee simple named in the will of *W. Thompson*, (deceased). She died in the year 1843, having appointed the Defendant *Charlotte Siddall* her sole executrix, who proved her will. *B. Norton* died in the year 1837, and his wife died in the year 1845. After *B. Norton's* decease, a suit (*Greene v. Norton*) was instituted, having for its object the administration of *B. Norton's* estate; and, under the decree made therein, *G. Thompson* carried into the Master's office a claim against the estate of *B. Norton*, as a creditor, under the bond of indemnity given to her by *B. Norton*. Under these circumstances the present bill was filed, seeking to make the estate of *G. Thompson* answerable for the sum of 6300*l.* and interest, from the death of *B. Norton*, the Plaintiffs being the legal personal representatives and also assignees of *C. Norton* of her life-interest in the sum of 6300*l.*

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The Defendant *C. Siddall*, by her answer stated, that *C. Norton*, and the rest of the family of *B. Norton*, and their issue, knew of the sale of the estates and the receipt of the purchase-money by *B. Norton*, and all the circumstances relating thereto, and acquiesced therein.

The *Vice-Chancellor of England* was of opinion, that the trust estates were not devised by the will of *W. Thompson*, according to the true construction thereof; but decreed, that *G. Thompson*, having acted as a trustee, and in that character permitted *B. Norton* to receive the sum of 6300*l.*, her estate was liable to make good the same, with interest at 5*l.* per cent. per annum, from the death of *B. Norton*; and a reference was directed to the Master to compute interest on the sum of 6300*l.* at the rate of 5*l.* per cent. per annum, from the date of *B. Norton's* decease; and the Master was to distinguish between the interest that accrued in the lifetime of *C. Norton*, and the interest that had accrued since her decease. The decree then directed the taxation of the costs of all parties to the suit, except the Defendants *C. Siddall*, *W. S. Norton*, and *Octavius Greene*, and the payment thereof out of the estate of *G. Thompson*. The sum of 6300*l.* and interest was also ordered to be paid out of the same estate, in case assets should be admitted by the Defendant *C. Siddall*; but, if assets should not be so admitted, then the usual accounts were directed against her.

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*C. Siddall* having appealed from that decree,

*Argument.*

Mr. *Bethell* and Mr. *Lewin*, for the Plaintiffs, after stating the facts already appearing, contended that there existed no question between the Plaintiffs and the estate of *G. Thompson* as to title, though there was one between that estate and the purchaser, *G. Thompson* having accepted a bond of indemnity to protect her against the pay-

ment of the purchase-money to the *cestuis que trust*; that it was not material whether *G. Thompson* took the fee simple in the trust estates under the devise contained in *W. Thompson's* will or not, inasmuch as she claimed the office of trustee and acted in that character, and the purchaser of the trust estates was in the actual enjoyment thereof, under the deed of conveyance executed by her: *Lord Braybrooke v. Inskip* (a); and that, where a trustee was guilty of a direct misapplication and perversion of trust funds, the Court charged him with 5*l.* per cent. per annum interest: *Crackelt v. Bethune* (b), *Bick v. Motly* (c), *Tebbs v. Carpenter* (d), *Munch v. Cockerell* (e).

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Mr. Rolt and Mr. F. T. White, for the Appellant.—*W. Thompson* took no legal estate in the trust premises, and as the Plaintiffs claim through *C. Norton*, the legal estate ought to be represented. *G. Thompson's* conveyance had no effect on the trust estates, and the real question is, whether the Plaintiffs have a right to proceed at the present moment against her estate, as it is possible the trust estates may be recovered from the purchaser. If the fee simple of an estate could pass by the words used in the early part of a will, still, if that which follows is inconsistent with the trustee taking the fee simple, the Court will lean in favour of his not taking it. In the present case, the intention of the testator was to give the legal estate to the trustee, *W. Thompson*, only during the lifetime of the testator's widow, for the better securing the annuity of 150*l.* given to her by the will, and not to give him the fee simple: *Doe d. Shelley v. Edlin* (f); and the only difficulty that can arise on the will is, whether the power of sale contained in it, which is not devised by the will of *W. Thompson*, is tantamount to a gift of the legal fee simple.

(a) 8 Ves. 417.

(b) 1 J. &amp; W. 586.

(c) 2 My. &amp; K. 312.

(d) 1 Madd. 290.

(e) 5 M. &amp; C. 178.

(f) 4 A. &amp; E. 582.

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[The LORD CHANCELLOR.—My opinion is, that *W. Thompson* took the legal estate under the will of *W. Spencer*.]

It will be assumed, then, that *W. Thompson* took the fee simple. It is contended, for the Plaintiffs, that the charge by his will is of a gross sum of money, and not of an annuity, and therefore the trust estates passed thereby; but it is immaterial whether the charge is in the form of one payment or more than one. It is also proved that *W. Thompson*, at the time of his death, had a brother named *Jonas*, who died in the year 1821, and was living when the sales were made; and it is denied by the Appellant's answer that *E. Thompson* was the heiress-at-law of *W. Thompson* at the date of the sale of the trust estate; and in the deeds of conveyance, by which she only covenants for her own acts, all mention is omitted of the charge of the gross sum of 50*l.*; and the sale is recited to have been made in pursuance of the power of sale contained in the will of the testator *W. Spencer*. At all events, the decree cannot stand, so far as it directs payment of the purchase-money, inasmuch as the Plaintiffs have no interest therein. *C. Norton* ought to be considered in the light of a feme sole, as respects the power of sale, and is liable to the consequences of an improper execution of the power: Sugden on Powers (a). Then, a strong case of acquiescence in the sale transactions is alleged by the Appellant against *C. Norton* whilst she was discoverte, and her family; and she has had no opportunity afforded her of making out the same. With reference to the question of the rate of interest to be paid, this case is merely one of negligence on the part of *G. Thompson*, and therefore the Court will not, if the decree should be held good, in ordering payment of interest, direct payment of more than 4*l.* per cent. per annum.

(a) Vol. 2, p. 103.

Mr. *Bethell*, in reply, observed that the Plaintiffs made no complaint against the sale of the trust estates, but only of the wilful neglect of the trusts arising thereout: and as to the Plaintiffs proceeding only to recover interest, the trusts could not be carried into effect without a re-investment of the capital. That the *cestuis que trust* had a right to say to the trustee, we will look to you for the purchase-money, and not have recourse to your agent *B. Norton*; that the circumstance of *G. Thompson* having improperly permitted *B. Norton* to receive the purchase-money, did not vary the case from a receipt by herself; and that the Appellant would be able, in the two suits of *Greene v. Norton* and *Fiske v. Norton*, to recoup herself out of the assets of *B. Norton*, the amount she might have to pay in the present suit in respect of the breaches of trust complained of.

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The LORD CHANCELLOR:—

This was an appeal against a decree of the *Vice-Chancellor of England*, by which it is declared, that *Grace Thompson* having acted as trustee, and in that character permitted *Benjamin Norton* to receive the sum of 6300*l.*, the estate of *Grace Thompson* was liable to make good the same. Then there is a declaration against the estate of *Grace Thompson*, and the direction to ascertain what is due for interest at 5*l.* per cent. on that sum.

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*Grace Thompson* is the personal representative of the party alleged to be the heir of the person who is appointed trustee under the will of *William Spencer*, who was the original testator. By that will *William Spencer* gave certain property for life to a trustee who is now dead, under terms, which, in my opinion, vested the property in him. I expressed that opinion at the time the case was heard; therefore I do not repeat it now. A question was made, whether

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he had, or not, the estate, or only a power. My opinion is, that he had the estate, and therefore, the matter was to be looked at on that assumption. He gives the beneficial interest over to *Catherine Norton* for life, then amongst her children in tail; but there was a power or a direction to sell the estate, and in the event of a sale, there was either to be a re-investment on the same terms as the original estate, or in the alternative, it was to remain as money, and the money so laid out was, after the life estate of *Catherine*, to be divided among her children at twenty-one. It appears, that, after the death of the trustee named, the party against whose estate this decree is made, namely, *Grace Thompson*, (whether by right or not, is not material for the present purpose, in my view of the case at least) assumed to act as heir of the former trustee, and assumed, therefore, the right and power of selling a certain portion of the estate, the purchase-money being of the amount of 6300*l*. This was clearly done with the concurrence and consent of *Benjamin Norton* and *Catherine* his wife, the tenants for life. *Catherine Norton*, who had the tenancy for life, had not, however, a tenancy for life to her separate use, but a simple tenancy for life, and *Benjamin Norton*, who concurred in the sale, it seems, received the 6300*l*. The party who sold, that is to say, *Grace*, gave the receipt to the purchaser, but it is not a matter in dispute that the money came to the hands of *Benjamin Norton*, and he gave a bond of indemnity to *Grace*, to indemnify her against the consequences of this acknowledged breach of trust.

Now that this was a breach of trust, and that it was an obvious wilful breach of trust, of course cannot be matter of any doubt. It was a fictitious receipt. She did not receive the money; she obtained no control over the money; she handed over the money to another person, who had no right to receive it, and she took a bond of indemnity from that party, to protect her against the consequences

of this admitted breach of trust. It went on, and *Benjamin* died, and the wife *Catherine* survived eight years from the death of *Benjamin*. The first Plaintiff in the cause is the personal representative: the others are parties claiming derivative interests from the tenant for life. The tenant for life is dead. These parties have no interest whatever in the fund beyond what may arise from the tenancy for life of *Catherine*, and they so frame this suit, and they so pray by their bill; all that they ask by their bill is, that they, deriving title from *Catherine*, may have, against *Grace Thompson* or her estate, that which ought to have been paid to *Catherine* after the death of her husband. I have looked through the pleadings, the bill, and the answer,—there being no evidence that I have been furnished with,—and I do not find any case made against *Catherine*, after the death of *Benjamin*; that she concurred as a married woman, not having a separate interest in the property, but being a party whose consent was required by the will to the sale, is quite true; but I can find nothing affecting *Catherine* after that breach of trust, with regard to that life estate. I can find no act of hers when she was *sui juris*, and therefore capable of affecting her own rights, by which she could be deprived of the right to receive what might be coming due to her in respect of her life estate. Now, the Plaintiffs claim and derive title only in respect of that life estate. There is no continuing interest to be protected, no further trust to be performed, either for the benefit of the tenant for life, or the parties claiming under the tenant for life, except for the purpose of the realising of that which ought to have been paid to the tenant for life in the interval that elapsed between the death of the husband and the death of the tenant for life, *Catherine*. The decree, however, declares that she is liable to make good the 6300*l*. Now, that of itself would have been rather a difficult decree to maintain, inasmuch as there is no interest whatever claimed in that

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6300*l*. There is an interest in the fruits which would accrue from that 6300*l*. during the life of the tenant for life; and the bill not asking for it, and the Plaintiffs having no interest in it, I have, more for the purpose of curiosity than for any other reason, looked through the bill, and traced the interests of the several other children, and I can very well see why they have not come forward; because, with the exception of one, the second son, who married and had a child, who is made a party to this suit, the bill itself states that which would have been an answer to those interested in the corpus of the 6300*l*. The eldest son sold his interest in that to the father. I am now speaking of the allegations of the bill. Two of the daughters, and one son, concurred in charges many years ago, during the life of *Catherine*, actually reciting, that the 6300*l*. was in the hands of the father. They were then *sui juris*; they knew exactly where the funds were, and they would find it very difficult to establish a claim against the trustee. With regard to one *William Spencer Norton*, who married, and upon his marriage settled his share, that share, it would appear from the statement in the bill, would now belong to his child, who was the only child of that marriage; still there is such a case against four out of five, if not against the whole, against those claiming under this settlement the corpus, that, giving the Plaintiffs against the trustee the remedy of having the whole money paid, would appear to me to be contrary to anything alleged, and not justified by anything in the cause. One way of trying that, according to the well-known rule now, would be this, that, if a party pending the suit comes and says, "I give you all you ask, dismiss the bill," all that is asked is, the money belonging to the life income of *Catherina*. That is all the Plaintiffs claim, because they derive title only through her, and she had only a life estate. If, therefore, the parties had come to the Court and tendered what the Plaintiffs ask, there would have been an end of the suit;

and how is it, then, that, in the decree, a great deal more is given than could enure to the allegations in the bill? With the exception of one of them, the *cestuis que trust* appear to be concluded by something that took place during the life of *Catherine*. I apprehend that the fact of the life having dropped could hardly have been adverted to. The origin of the decree must have been on the supposition that the life estate continued, when those interested in the life estate would have a right to have the life estate secured by the investment of capital, without regard to those who might come afterwards, whether the remainder-men had or not barred themselves by anything that had taken place antecedently. But as the matter stands, there is no party for whose benefit this 6300*l.* could enure, —certainly not any interest which the Plaintiffs claim in this suit. It appears to me, therefore, with regard to the 6300*l.*, that the declaration here, that the estate of *Grace Thompson* is liable to the 6300*l.*, cannot be supported. I think the decree is entirely right, as it makes *Grace Thompson* liable; indeed, there is no question about it. She took on herself, as the decree recites, to act as trustee; and if a party takes on himself to act as trustee, and to sell a trust estate, and receives the purchase-money, it will not do for that party, whether the purchase-money remains in his pocket, or he hands it over to somebody else, under circumstances that leave him liable, to say, “I do not think, under the circumstances, I was, strictly speaking, a trustee; somebody else was, and therefore you, the *cestuis que trust*, cannot call on me for the payment of the purchase-money.” It is quite clear that that could not be listened to; and therefore the decree very properly recites, that she having taken on herself to act as trustee, and in that character having received the purchase-money, she was liable, leaving, of course, the question of liability to whom and for what open. Seeing no case made out even for inquiry as against *Catherine*, or those who claim through *Catherine*, I

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think the Plaintiffs are entitled to all that *Catherine* could claim, if she had been alive, and was now to receive payment of the income which she ought to receive. To that extent, I think, the decree is right, and in that way it ought to be altered; and when so altered, it will give the Plaintiffs all they appear to be entitled to.

But then there is another part of the case not provided for in the decree at all, though it appears by the pleadings, that *Benjamin Norton* no doubt was one of the parties who received the money; and it is alleged, not positively alleged, but suggested, that the money received was laid out in the purchase of some real estate by *Benjamin*. Now, the principal purchase there alleged to have been made, I forget the name of the estate, appears to have been made previously.

[*Mr. Bethell*.—Your Lordship will pardon me; that is another sum.]

THE LORD CHANCELLOR.—I was about to say, that estate was purchased before the time when this sale took place, and, therefore, it could not have been purchased with the 6300*l.*, independently of its being a different sum; but there were other estates of smaller amount, which appear to have been purchased afterwards by *Benjamin*, and with respect to which there is no distinct information; at least I have not been able to find any, either in the bill or the answer. Now, *Benjamin* directs, that what he has advanced to his children, if the children should quarrel with the disposition of his will, shall be made the subject of account between them and his estate. Those accounts are not concluded; and it appears by the proceedings in the other suit, that that account is pending, and there is a possibility of there not being assets of that estate. Whether that includes the real estate, or only the personalty,

I do not know, but I do not think it very material. This I think the Plaintiffs are entitled to. There appears reason to inquire on the pleadings, whether *Benjamin*, who all parties admit received this 6300*l.*, did not lay it out in the purchase of some other estate. Why, it would have been an irregular transaction to have laid it out, and if he laid it out, probably he would take the conveyance in his own name; but still, if it was so laid out as to entitle the parties interested in the 6300*l.* to follow the estate and to claim the proceeds of that estate in repayment of the 6300*l.*, why, then, the surety,—for so I consider the trustee, who did not actually receive the money, though liable in the first instance in the character of surety,—would be entitled to any remedy against the property which the *cestuis que trust* themselves could enforce. Though that ought to appear against the *cestuis que trust* and the defaulting trustee, who is liable in the first instance, I think she is entitled to some inquiry as to the manner in which the money was invested and dealt with, and whether those beneficially interested in the money have any claim or lien on that purchase-money. It cannot possibly prejudice the Plaintiffs in this suit. I think that is no more than what the defaulting trustee, called on to pay in the first instance, is entitled to in order to ascertain what remedy she may have as against the principal debtor, namely, *Benjamin Norton*, whose representatives are parties to this cause, but as against whom the Plaintiffs do not seek a remedy, but prefer seeking a remedy against the defaulting trustee (a).

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It was then arranged, on the part of Counsel and the Court, that interest should be paid to the Plaintiffs after

(a) The proposed inquiry mentioned by his Lordship, having been found to have been already the subject of the decree (in 1839)

in the suit of *Greene v. Norton*, was waived by the Counsel of the Defendant *C. Siddall*.

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the rate of 5*l.* per cent. per annum on the 6300*l.*, from the death of *Benjamin Norton* to the death of *Catherine Norton*, and that there should be a declaration of the Court to that effect; and that *Grace Thompson* having acted as trustee, her estate was liable to make good the same.

After a discussion, which arose as to the costs of several Defendants, who appeared by the *Lord Chancellor's* judgment to have been improperly made parties,

The LORD CHANCELLOR expressed himself as follows:—

The Defendants never find out that the Plaintiffs have improperly framed their suit till the expense is incurred. The Defendants seem to have thought they were interested in supporting the Plaintiffs' case. I think that those who appear for the parties interested in remainder can have no costs. They have not repudiated, but, on the contrary, adopted the suit, and endeavoured to take advantage of it. It turns out they get nothing from the suit. But still, the Plaintiffs are exonerated from having improperly made them Defendants, if they were improperly made Defendants, by the course the Defendants have taken. I do not see how the Court could have dealt with the suit without having them here, because many of the questions were common to all. Who was trustee? All that is common to both. It is a suit rather unfortunately framed—very likely from necessity. There might have been difficulties in bringing the claim forward with other parties. In point of fact, there being no Plaintiff who is interested in the capital, this suit is in a very peculiar position. I think those who have taken the benefit of the suit,—at least, have endeavoured to take the benefit of the suit, and, at one time, actually received the benefit, though they have now lost that benefit,—cannot say that the suit was improperly brought against them; and, therefore, they must not have their costs.

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& 20th.

**T**HE bill was filed by the Plaintiffs, who, in and previously to 1847, were merchants at *Liverpool*, carrying on business under the firm of *Reid, Irving, & Co.*, and the Defendants *Peter Langlois* the elder, and *Peter Langlois* the younger, were at the same time merchants at *Quebec*, in *Canada*; the other Defendant, *John Jones*, was a mortgagee from *P. Langlois* the younger, of, and otherwise interested in a ship called the *European*. The object of the bill was to restrain proceedings in an action at law brought by *P. Langlois* the younger, against the Plaintiffs, to recover the sum of 6000*l.* and upwards, the value of the ship, which the Plaintiffs had received from the insurers of it, the same having become a total wreck on its voyage to the *Clyde*.

*L.*, resident at *Quebec*, brought an action of trover against *R.*, to recover the amount of certain insurance monies received by *R.* in respect of a ship that had been wrecked; whereupon *R.* filed his bill against *L.* and his partner, and the mortgagee of *L.*, to restrain proceedings in the action, on the alleged ground that the ship was the property of *L.* and his partner, who became indebted to *R.* in a large balance on a mutual account, in respect of which *R.* claimed to retain the monies so received

The Plaintiffs, during the year 1847, acted as the agents, at *Liverpool*, of the two Defendants *Langlois*, carrying on business under the firm of *Langlois & Son*, at *Quebec*; and the latter, until they stopped payment on the

by him by way of set-off. *L.*, in his answer to the bill, stated, that, in the first part of the schedule, he had set forth certain books and documents belonging to the firm of *L.* and his partner, and not to the Defendant *L.* alone, and in the joint possession of *L.* and his partner, but which partnership had since been dissolved. A motion by *R.*, for production for the usual purposes of those books and documents, was refused.

*L.*, in the same answer, also claimed, as privileged communications, certain "letters from the Defendant *L.* to *R. & B.*, his agents in *England*, to be communicated by *R. & B.* to Messrs. *W. & M.*, the legal advisers of the Defendant in *England*:"—*Held*, that the Defendant was not bound to produce the same for the Plaintiff's inspection.

On a motion for production of documents set forth in an answer, or to pay money into Court, the Plaintiff will not be allowed to rely on an insulated passage in the answer, but must take the whole case as it is found in the answer.

The existence of an error or an inaccuracy in an answer in the description of some document not in question, where there is no ground for imputing wilful falsehood to the Defendant, is no reason for rejecting the oath of the Defendant altogether.

Where a party files a bill seven months after action commenced against him, to restrain proceedings therein, and obtains the common injunction, and afterwards is guilty of great delay in the suit, the Court will decline granting the Plaintiff any time whatever by postponement of the trial of the action.

Observations on *Bunbury v. Bunbury*, 2 Beav. 173.

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7th of September, 1847, were in the habit of consigning goods to the Plaintiffs for sale, and drawing bills of exchange on them, which were accepted by them, from time to time, on being apprised of goods having been consigned to the Plaintiffs by Messrs. *Langlois & Son*. The Plaintiffs by their bill insisted that a large balance was due to them from the firm of *Langlois & Son*, in respect of the transactions between the two firms; and that *Langlois & Son* were the real owners of the ship the *European*, and that the Plaintiffs were entitled to set off the insurance monies received by them in respect of the ship, against such balance. The partnership previously subsisting between the Defendants *Langlois* the elder and *Langlois* the younger, was dissolved on the 31st of January, 1848. The action was commenced in the month of April, 1848, and on the 6th of May following, issue was joined in the action. A commission was afterwards issued on behalf of the plaintiffs and defendants in the action, out of the Court of Exchequer, for the examination of witnesses in *Quebec*, which was executed in August, 1848; and the present bill was filed on the 9th of November in that year. The first answer of the Defendant *P. Langlois* the younger was filed on the 15th of May, 1849; and exceptions having been allowed thereto, and the bill amended, that Defendant filed his further answer, and answer to the amended bill, on the 10th of October, 1849. The material question in the suit was the ownership of the vessel the *European*. The Plaintiffs relied strongly on the expressions contained in several letters received by them from *Langlois & Son*, (particularly adverted to by the *Lord Chancellor* in his judgment), in the months of May and June, 1847, as evidencing the ownership of the vessel, in which the first person plural was frequently made use of; as, for instance, "The *European* was purchased and repaired by us," &c.; "If, on arrival with you, the value of the vessel could be obtained, we would sell her."

The bill charged, that divers of the documents relating to the matters in the bill mentioned, which were formerly in the possession of the firm of *Langlois & Son*, were then in the possession of *Langlois* the younger, alone; that divers letters and other written communications had passed between the Defendants, and also between the Defendants and their agents, relating to the matters aforesaid, and that the Defendants had in their possession or power, or in the possession or power of their solicitors or agents, the said letters and other written communications, and also divers books, accounts, letters, &c., relating to the matters mentioned in the bill. The Defendant *Langlois* the younger, in his answer to the original bill, stated, that the ship the *European* was a British ship, which was, in the year 1846, stranded in the *St. Lawrence* river, abandoned by the owner, and afterwards purchased by the Defendant for the sum of 400*l.*, *Canada* currency, and paid for out of his own proper monies; that the Defendant *Jones* afterwards advanced 800*l.* for the repairs of the ship, and after the completion of the repairs, the Defendant *Langlois* the younger was on the 31st day of May, 1847, duly registered at *Quebec* as its sole owner; that the mortgage of the ship to the Defendant *Jones* was not executed till the 4th of September, 1847, although the agreement to do so had been long previously entered into; that notice of the mortgage was duly registered on the 6th of September in that year; that the firm of *Langlois & Son*, acting as the agents of the Defendant *Langlois* the younger, in May, 1847, sent the ship on a voyage to *Liverpool*, loaded with freight, and consigned to the care of the Plaintiffs, accompanied by a power of attorney from the Defendant *Langlois* the younger, to enable the Plaintiffs to procure the ship to be new classed, and to sell her, if a price named in the instructions sent to the Plaintiffs could be obtained; that the power of attorney was received by the Plaintiffs early in June, 1847, and on the arrival of the ship at

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*Liverpool* in the month of July, 1847, repairs were found necessary, and afterwards done at the expense of the Plaintiffs.

The Defendant *Langlois* the younger in the same answer stated, that he had in the schedule thereto set forth a true list of all documents relating to the matters in the bill mentioned, which were then in his possession or power; that he was then resident in *Quebec*, and carried on business as a merchant there; and that the documents enumerated in the first part of the schedule related not only to the matters in the bill mentioned or referred to, but also to other matters not in question or connected with the suit, and were then in *Quebec*, and in constant use there in the Defendant's business; and the same could not be sent to *England*, or taken out of the possession of the Defendant, without great inconvenience to him and his business; and he submitted, that, under the circumstances set forth in his answer, the Defendant ought not to be compelled to part with, or send to *England*, or leave with the officer of the Court, the documents mentioned and enumerated in the first part of the said schedule. And the Defendant by the same answer further stated, that the letters mentioned and described in the second part of the said schedule were confidential communications which had passed between the Defendant, or his agents on his behalf, and his solicitors and legal advisers, and between the solicitors and legal advisers of the Defendant, after the matters in dispute in the cause had arisen, and in reference to the same matters, and in contemplation of and in reference to litigation between the Defendant and Plaintiffs; and that the case for the opinion of Counsel, and other documents, (besides such letters,) mentioned and described in the second part of the said schedule, and each and every of them, were prepared after the matters in dispute in the cause had arisen, and in reference to the same matters, and in contemplation of

and in reference to litigation between the Defendant and the Plaintiffs; and he submitted, that the said letters, case, opinion and other documents mentioned and described in the second part of the said schedule were privileged, and ought not to be produced. And he further stated, in the same answer, that the documents mentioned and enumerated in the first and second parts of the schedule belonged to the said late firm of *P. Langlois & Son*, and were in the possession, not only of the Defendant, but also of the said *P. Langlois* the elder, as one of the late members of the said firm.

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The Defendant *P. Langlois* the younger, in his further answer to the original bill and answer to the amended bill, stated, that the documents mentioned and enumerated in the first and third parts of the schedule annexed to his former answer relating to matters in the amended bill mentioned, were formerly in the possession of *P. Langlois & Son*, and after the 31st of January, 1848, and until the 31st of May, 1849, were in the possession of *P. Langlois* the elder jointly with the Defendant, and since the said 31st of May, 1849, had been, and then were in the joint possession of *James Richard Langlois*, the Defendant's brother, and the Defendant; and that the Defendant and the said *J. R. Langlois* were bound to produce the said last-mentioned documents as and when they might be required so to do by *P. Langlois* the elder; and that such last-mentioned documents, and each of them, were and was still in the power of *P. Langlois* the elder.

The Defendant by the same answer denied that any of the documents relating to the matters in the amended bill mentioned, or any of such matters, which were formerly in the possession of *P. Langlois & Son*, were then in the possession or power of the Defendant alone; and he stated that he had then in his possession such documents relating to



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the matters in the original bill, and in the amended bill mentioned, as were enumerated in the schedule annexed to the former answer of the Defendant, and to which he referred, and also an original letter written and sent by the said *J. Jones* to the Defendant, dated the 18th of May, 1848, relating to the action in the said amended bill mentioned; and that *P. Langlois* the elder, formerly, and till the 31st of May, 1849, had in his possession the documents relating to the matters mentioned in the original bill, and in the amended bill, and enumerated in the 1st and 3rd parts of the schedule annexed to the former answer of the Defendant; and that such last-mentioned documents were then, and since the 31st of May, 1849, had been, in the possession of the Defendant and the said *J. R. Langlois*, but in the power of the said *P. Langlois* the elder, as thereinbefore was mentioned.

On motion before the *Vice-Chancellor of England*, on behalf of the Plaintiffs, for production in the usual way of the letters, documents, books, and papers mentioned in the Defendant *P. Langlois* the younger's answers, and described in the 1st, 2nd, 3rd, and 4th parts of the schedule to the first answer, his Honor granted the motion, with the exception of the case and opinion of Counsel, and certain correspondence, which his Honor considered was privileged, and which was excepted in the order made, when drawn up and passed. In the 2nd part of the first schedule to the Defendant's answer, two letters were set forth as follows, viz: "Two letters from the Defendant to *Robinson & Brooking*, the agents of this Defendant in *England*, dated the 30th of August, 1848, and 5th of July, 1848, to be communicated by the said Messrs. *Robinson & Brooking* to the said Messrs. *Wadson & Malleson*, the legal advisers of this Defendant in *England*." Another letter set forth in the same part, was as follows: "From Defendant to *Robinson & Brooking*, dated the 1st of Feb-

ruary, 1849;" and those three letters were amongst the documents ordered to be produced. Against that order the Defendant appealed.

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Mr. *Stuart* and Mr. *Cotton*, after stating the facts, and that the Defendant did not object to the production of the documents described in the 3rd and 4th parts of the schedule to the answer to the original bill, contended that the Court below had erred in directing letters to be produced which had been written by the Defendant to certain agents of his in *England*, to be communicated by them to the Defendant's solicitors there; and other letters to be produced which had been written by the Defendant to the same agents generally; as also in ordering the production of books, which were not the sole property of the Defendant, but belonged to him and another party (who were in co-partnership) and that party not being before the Court, and having the same power over the books as the Defendant had, and therefore a right of access thereto at all times; that there existed no inconsistency in the two answers of the Defendant, as had been supposed by the Court below; that, although the letters emanating from the firm in *Canada* were not framed with the same care and strictness as the letters of professional men, still, when connected with the statements contained in the answers relative to the certificate of registry and power of attorney, it was clear that the vessel was the exclusive property of the Defendant *Langlois* the younger, and that the only object of the Plaintiffs was delay, as was clearly evidenced by the dates of the various proceedings in the suit and action.

Mr. *Bethell* and Mr. *Goldsmith*, contra, contended, that the object of the Defendant was to repudiate the acts of his agent, touching the transactions between him and the Plaintiffs, relative to the ship insurance money; that the

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letters from the firm of *Langlois & Son*, shewed that the ship was the property of the firm, and that the Plaintiffs had a lien on her for the expense of repairing her; that a sound equitable case was stated by the bill, for the interference of the Court, and that sufficient admissions were contained in the answers to justify the order of the Court; that the books of the dissolved partnership of *Langlois & Son*, being in the possession of the Defendant, ought to be produced, but even if they were to be considered as in the possession of *Langlois & Son*, still, according to the statement in the answer, those parties were the agents of the Defendant, and therefore the books ought to be produced; that the passages in the two answers were difficult to be reconciled, inasmuch as the Defendant sometimes said that the documents were in the possession of the firm, and, at other times, that they were in his sole possession; that the privilege emanating from confidential communication, which had its origin in the necessities of mankind, could not be said to apply to three of the letters, described as written by the Defendant to Messrs. *Robinson & Brooking*, who were not members of the profession of the law, nor connected in any manner therewith, and who in a Court of law might have been questioned as to the contents of those letters, which were not written for professional advice, and that, at all events, there was no ground whatever attempted to be shewn for discharging the latter part of the order which had reference to the documents set forth in Parts 3 and 4 of the schedule to the first answer of the Defendant.

Mr. *Stuart*, in reply.

The LORD CHANCELLOR, at the conclusion of the argument, observed, that the case very much depended on the expressions used in the answer, which he would look into, and give his opinion the following morning.

The cases of *Thorpe v. Hughes* (a), *Walker v. Wildman* (b), *Steele v. Stewart* (c), *Curling v. Perring* (d), *Holmes v. Baddeley* (e), *Taylor v. Rundell* (f), *Murray v. Walter* (g), and *Ex parte Yallop* (h), were cited in support of the appeal; and the cases of *Bunbury v. Bunbury* (i), *Maden v. Vesvers* (k), *Kerr v. Gillespie* (l), and *Rodick v. Gandell* (m), contra.

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The LORD CHANCELLOR:—

This case appears to me to turn entirely on the meaning to be attached, and the construction to be put on some few sentences in the answer, with reference to a perfectly well-known and established rule of practice in this Court.

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The motion is, to produce certain documents which are alleged by the Plaintiffs, and admitted by the Defendant, to be in his possession; an action of trover having been brought by the Defendant, the bill is filed, the common injunction obtained, and the usual order made to extend the injunction to stay trial on the answer coming in. Some exceptions were taken to the answer; and upon an order nisi to shew cause why the injunction should not be dissolved, the *Vice-Chancellor of England* made an order, by which he directed the production of certain documents appearing in the schedule to the answer of May, 1849, and in the meantime adjourned the consideration of the order for dissolving the injunction until those documents had been produced. Now, the documents in question, which are in the

- (a) 3 M. & C. 742.
- (b) 6 Madd. 47.
- (c) 1 Ph. 471.
- (d) 2 My. & K. 380.
- (e) 1 Ph. 476.
- (f) Cr. & Ph. 104.

- (g) Cr. & Ph. 114.
- (h) 15 Ves. 60.
- (i) 2 Beav. 173.
- (k) 7 Beav. 489.
- (l) Id. 572.
- (m) 10 Beav. 270.

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schedule to the answer put in in May, 1849, are of two descriptions. The first consist of those which are described in the 1st part of the schedule, as follows: viz. "Journal marked A.; cash-book, marked B.; ledger, marked C.; letter-book marked D.; bills receivable and bills payable, in one book, marked E." Now, the case made by the Defendant, who is desirous of dissolving the injunction, and who has brought an action of trover, is, that he was partner with his father, carrying on business at *Quebec*, and that they had correspondence with Messrs. *Reid, Irving, & Co.* of *Liverpool*, and in the course of which a mutual account arose; that a ship, called the *European*, was consigned to them, with instructions in a certain event to sell, at all events to deal with or manage it, on behalf, as the Plaintiffs allege, of the house in *Quebec*. The Defendant who has brought the action says, that the ship was his, that it did not belong to the house in which he was a partner, but that it belonged to himself, and he has brought an action of trover for the purpose of recovering damages for the conversion of the ship, the ship having been dealt with by *Reid & Co.*, and lost in a voyage which they directed should be taken by it to *Glasgow*, and in respect of which they have received the amount of the insurance monies. All that becomes quite immaterial to the question at law, in the action of trover; that is, the right at law, the legal title to the ship. In equity, if there be an equity to be built on the title to a ship, which is a matter into which I do not at all enter, because it is not necessary for the purpose of disposing of the present motion, it is entirely open to the Plaintiffs, without regard to who was the legal owner of the ship. Undoubtedly, if they can make out that the Defendant was not the legal owner of the ship, they will have an answer to the action of trover. If, on the other hand, the Defendant was the legal owner of the ship, and recovered in the action of trover, if they have any equity which can attach on the ship, though it may be one totally unaffected by the

fact of who is the legal owner of the ship, the difficulty of attaching an equity to a ship is a matter on which I do not mean at present to make any observation. Now, it turns on the language of the answer of the Defendant, whether what he says is capable or ought to receive one construction or the other. The Defendant resists the production of the documents in the 1st part of the schedule on this ground: he says, "I was partner with my father in the house; we carried on business together; these documents in Part 1 of the schedule, were documents, books, journals, and papers belonging to the house; they did not belong to me exclusively, but they belonged to the house; and you are now asking for an order against me individually to produce those documents, and those documents, I say, I have it not in my power to produce; they are not in my exclusive possession, but are in the joint possession of myself and my father." It is true, the answer admits, that, after a certain period the partnership ceased, but there was no bankruptcy or insolvency, and therefore no transfer of the interest of the father to any other person; whether the business was actually carried on or not carried on, the property not having passed into the hands of other parties, that which was joint property, or property in common at the time the business was carried on, and at the time, therefore, when the business ceased, remains, if not converted into separate property, just where it was as between the partners at the time when the partnership ceased to carry on business. It is just as much, therefore, in the legal hands and possession of the two partners now, as it was if the business had actually been carried on—nothing being alleged by which the state of the property existing at that time has subsequently been changed.

Now, on that statement in the answer, the Plaintiffs read insulated passages, in which the word "possession" is used, and the Defendant has perhaps incautiously, in the

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answer, in single and detached passages, admitted that the documents are in his possession; but it is quite clear that you cannot read a single insulated passage detached, on a motion to produce documents, or on a motion to pay money into Court; you must take the whole case as it is found in the answer; and it is certain, on the whole answer, that what the Defendant means by possession, in a certain passage, does not mean legal possession, it means actual corporeal possession;—and a man may have, in his own desk, or in his own house, property of which he is only part owner. In one sense, it is in his possession; but when we are speaking of possession for the purpose of production, that is to say, a right and power to deal with it, we do not mean actual corporeal possession, we mean legal possession, in respect of which the party is authorised to deal with the property in question. I have no hesitation in saying, and it is not open to doubt, that on this answer the Defendant does state that his father is in the joint legal possession with himself, and that the books, therefore, are not under his direction or control, not being in his sole possession; that is, in his sole legal possession, although they may be corporeally in his actual possession. The Plaintiffs must take the case as the answer states it. Here the answer clearly states the legal possession to be not in the Defendant exclusively, but in the Defendant and his father. The authorities are clear on this point, viz. that where the document is not in the exclusive possession of the Defendant, but in the possession of some one else jointly with him, you cannot order the production. The cases which were referred to, of *Murray v. Walter* (a), and *Taylor v. Rundell* (b), are quite conclusive on that point. I do not now lay down any new rule. I refer to the latter authorities as being cases in which that well-established rule is recognised, and cannot now be considered open to

(a) Gr. & Ph. 114.

(b) Id. 104.

dispute. On the first part of the schedule, therefore, it appears to me clear, that, according to the ordinary rule, the production cannot be ordered as the pleadings now stand. If there be anything in the case to shew some subsequent arrangement or transaction, by which the property has become exclusively property in the possession of the Defendant, it cannot be read on the present application; whether any amendment of the bill can produce discovery for that purpose, the Plaintiffs will have to consider.

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But another course is taken, and that argument does, as it seems to me, raise the most extraordinary conclusion, and totally unconnected with the rules of this Court. It is this, viz. "That you the Defendant cannot profit thereby, because you admit that you employed this house as your agents, and it has been decided in the cases which have been referred to, and about which there is no doubt, that if you admit that you have a document in the custody of your agents, you are bound to produce it." It is perfectly true, that if a document belonging to the Defendant is admitted by him to be in the hands of his agent, it is in his possession, because, having the control over it in the hands of his agent, he has the power of producing it; and it is in his possession just as much as if it was in his own hands, although actually in the hands of his servant. That is the rule referred to, and that is the only rule established in the cases referred to for the purpose of shewing this, viz. that if a transaction to which the bill relates as between the Plaintiff and Defendant has been transacted in part by an agent, the Plaintiff has a right to have produced the document of the agent. Now, no two things can depend on more different principles: one is clear by authority one way, and the other is equally clear the other way. There are no documents belonging to the Defendant, his own exclusive property, over which he has control, in the hands of that Defendant, nor in the hands of any agent of that



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Defendant; there are documents belonging to the house, the house being the agents, and employed by him; but you cannot, as against the house, get the documents unless you bring all the parties here, and shew an equity against all. That the Defendant was a member and a partner in that agency house is not disputed. All that the Plaintiffs can say, is, that they have an equity against the Defendant individually, to have these documents produced; that is common to every case where a Defendant has a document which he says, I have in common with another person; therefore you the Plaintiffs, as against me if I had a document in my own exclusive possession, would have a right to its production; but inasmuch as I say it is not in my exclusive possession, but that it is in the joint possession of me the Defendant and somebody else, you have no right to it against the party whose document it is, jointly with me; and the Defendant, if he be ordered to produce it, has not the legal power or control over it, and therefore has not the means of performing the order which the Court in that case would make. It appears to me, therefore, that, according to the ordinary rule, whatever the merits of the case may be, or whatever may come of it, if the Plaintiffs apply to amend their bill and proceed further upon the case as it stands on the answer, Part 1 of the schedule is protected by the allegations in the answer of the joint interest of the other persons, and the denial of the exclusive legal possession of the Defendant himself.

Then, with regard to the second point, viz. the privileged communications, some are not in dispute, and some are in dispute. Now, the first two documents which are in dispute, are entered in the schedule in this way. It is sworn in the answer, that the documents stated in the 2nd part of the schedule are documents which passed between the legal advisers of the Defendant and the Defendant him-

self or his agents. Now, Messrs. *Robinson & Brooking*, appear to have been the agents, and the entry is: [Here his Lordship read the statement in the 2nd part of the schedule, as to the two letters of the 30th August and 5th July, 1848.] There is a distinct statement, therefore, contained in the body of the answer, that all the documents here are communications between the Defendant or his agents and his legal advisers, and the statement in the schedule is, that two of these letters were sent to the agents for the purpose of being communicated to the legal advisers.

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Now the argument turned on this: that although I may have communication with my legal adviser, and that production of the documents arising out of that communication was protected, yet, if I send a message through a third person, in writing, it is not protected. It is obvious there is no sense in the distinction, the object is to protect the party who wished to take the advice of professional men; and he may be prevented from taking such advice, if there is the hazard of having all his communications revealed when he is entering into a contest with an opponent. It does not rest on principle and good sense alone, although that would be quite sufficient if there were no authority on the subject; but the point has been decided long ago, as matter of recognised principle, in the cases which have been referred to, of *Walker v. Wildman*(a) and *Bunbury v. Bunbury*(b). Then it is said, there must have been a necessity for the communication. The question is, what is necessity? It is impossible to say what is necessity. A man living at *Calcutta*, and wishing to advise with Counsel in *London*, in such a case must travel to *London* direct; he could not authorise his agent in *England* to communicate with a solicitor in *London*, but he must actually come or

(a) 6 Madd. 47.

(b) 2 Beav. 173.

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write himself. Now that is not a necessity; for a man certainly may travel from *Calcutta* for the purpose of taking a legal opinion, and must do so if the rule is to prevail which is contended for; he must either come himself here or write; he could not communicate through a third person. There is neither reason, nor, as I believe, authority, to favour such an argument, although the *Master of the Rolls*, in *Bunbury v. Bunbury*, says the necessity may exist; he nowhere limits the rule to the actual necessity arising, but he uses it for the purpose of shewing that there must be such a protection, because in many cases it may be exercised for the purpose of inquiring whether it is necessary or not; in many cases it may be unnecessary. One of these documents(a), however, as to which it is admitted there is some error, I suppose is one which is not protected, because there is nothing in it to shew that it had anything to do with the legal adviser. It is stated to be a letter from the Defendant to *Robinson & Brooking*, the agents, and there is no statement that it was communicated, or that it was sent to them for the purpose of being communicated; and it is not contended in the reply, that that could be protected; but with that exception, the other documents contained in the 2nd part of the schedule, coupling the schedule with the statements contained in the body of the answer, are letters or communications either passing from the Defendant or the Defendant's agents to the legal adviser of the Defendant, and are therefore privileged.

Being of opinion that the documents to which I have referred are all protected, except the letter of the 1st February, 1849, which I understand is in *England*, and which may be immediately produced, it appears to me that there is no ground for the order which was pronounced in the Court below.

(a) Letter of 1st February, 1849.

I will only now make an observation on one ground on which the case was argued before me, but which I cannot suppose to be the ground on which the *Vice-Chancellor* proceeded, viz. that there are certain errors in the schedule, and that there are certain papers which cannot be protected; the one which I have alluded to is one of them. Whether that is an error in describing it in the schedule, or whether it is an error in putting it there at all, does not appear. It is sufficient for the present purpose to say that the schedule does not describe it in terms which bring it within the protection; but to say, that, because there is error or an untrue statement in the pleadings in the description of some document not in question, without any ground for imputing wilful falsehood to the Defendant in the schedule (which we know is neither prepared by Counsel nor the party himself, but prepared, probably, by some third person, who does not always pay sufficient attention to the terms of the answer, so as to see that the schedule corresponds with the terms of the answer), that, with reference to the documents which are in question, you are to reject altogether the Defendant's oath, is a proposition to which I cannot assent; and it seems to me to be the reverse of all the rules on which this Court acts, which in these cases calls on the Plaintiff to shew his title from the answer. Then you must take the whole of the answer together, with relation to the particular subject-matter. The Plaintiff cannot say there is enough to shew that the answer is carelessly and loosely framed, and the oath does not bind the party, and therefore the Court must reject it altogether. What is the ground on which you ask for production at all? If the Plaintiff moves on the answer, he must take the answer quoad the subject-matter of the motion, according to what the Defendant has stated. How can it be affected by an error as to another document not in question, and which is not the subject-matter of the application? Now, looking to the subject-matter of the application made to the Court as to those

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documents in respect of which privilege is claimed, I see no inconsistency in the statement in the body of the answer; it is quite consistent with what is alleged in the schedule, that they are documents sent for the purpose of being communicated to the legal adviser, and therefore protected. I entirely reject, therefore, the argument that there is an inaccuracy in the schedule or the answer which ought to conclude the party, whatever ground there may be to lament the want of care in preparing the schedule, and describing documents referred to in the answer. It is impossible to give the Plaintiffs the right which they would not otherwise have, which is the subject of another admission, and of course coupled with such explanation as the Defendant gives as to that other matter.

I am of opinion, therefore, that all these grounds fail; but if they had not failed, I should feel extreme difficulty in this case in granting any time to the Plaintiffs in equity to postpone the trial of this action; and I proceed on this ground. The action of trover was commenced in April, 1848. From that time war was declared—the Defendants in the action, the Plaintiffs in equity, then knew what they had to contend with; they were acquainted with the point which they had to establish against the Plaintiff in the action of trover, and the Defendants in the action obtain the answer on which they are now moving. The action against which the present Plaintiffs desire the discovery to protect them, was commenced in the month of April, 1848. They do not file their bill till the month of November following; they obtain the answer in May, 1849, and they are now moving on that answer. Unless parties, who are seeking discovery in defence of an action brought against them, are, in all cases, to wait till the action is just on the point of trial, and then to be allowed to ask to have it postponed at their pleasure, there is no accounting for the delay in this case: first, in not filing the bill till the month of November, 1848, and then in not moving for the production of documents till the

month of November, 1849. The further answer did not improve the Plaintiffs' position at all; but whether it did or did not, the Plaintiffs moved on the first answer, and asked the Court to decide that they had a title. If they failed on the answer filed in May, 1849, that would not have prevented them from making a case on the further answer, filed in October, 1849; but they admit, in May, 1849, that they had not a case on the original answer. And, nevertheless, in the month of November following, after the further answer was filed, they obtained an order on the former answer, and they asked the Court to postpone the trial, which commenced in 1848, not having filed their bill till November following, and not having moved on the answer put in in May, 1849, till the November following. This is quite conclusive on the present application; and the result, therefore, must be, that the order made must be discharged to the extent I have stated, of course leaving the parties to proceed as they may be advised on the order nisi.

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 Judgment.

Costs were not given to the Appellant, on the ground that the Plaintiffs were entitled to the production of certain of the documents mentioned in the notice of motion, (but which the Defendant did not offer in the Court below to produce,) although not to the others: the order of the Court below remaining untouched as to the documents contained in the 3rd and 4th parts of the second schedule to the first answer, and also as to the letter of the 1st February, 1849.

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Nov. 30th,  
& Dec. 3rd.

On the formation of a Company, their deed of settlement contained certain rules and regulations for the transfer of shares, one of which was, that every erasure or other alteration which should have been made by the directors in the share register book should, as between the Company and the last proprietor, be conclusive on such proprietor as to the title to the shares.

There were also various provisions in the deed, framed for the purpose of preventing any fraud or improper transfer of shares, which it was the duty of the officer of the Company to see carried into effect. *C.*, a proprietor of shares in the Company, in the character of an

executor, deposited the same with the secretary, for the purpose of his registering them in *C.*'s name; the secretary, instead of so doing, sold the shares to *B.*, and received the purchase-money, and procured the erasure required by the deed to be made in the register book of the Company, but the other regulations required by the deed to be observed on a transfer of shares were not complied with. The secretary having absconded, *C.* filed his bill against the chairman and secretary for the time being, pursuant to a clause in the deed, providing that those parties should sue and be sued on behalf of the Company, seeking compensation against the Company in the nature of damages, in respect of the loss sustained by the Plaintiff, and a declaration of the Court to that effect. Neither *B.* nor the absconding secretary were made Defendants:—*Held*, on demurrer, filed by the two Defendants for want of equity and want of parties, that the demurrer was good for want of equity, on the ground that the transfer, not being in accordance with the requisitions of the deed of settlement, did not bind the Company.

*Seemle*, that *B.* was not a necessary party, the bill not questioning his interest in the shares. Leave was given to the Plaintiff, under the circumstances of the case, to amend the bill.

## DUNCAN v. LUNTLEY.

THE bill was filed by the executors of *William Clowes*, deceased, against the Chairman and Secretary for the time being of the Abney Park Cemetery Company, formed in the year 1839, with a certain capital, divided into shares; and prayed, that, under the circumstances thereinbefore mentioned, the estate and assets of the Company might be declared liable to make good to the estate of the testator, *W. Clowes*, the loss which his estate had sustained by the fraudulent sale of the fifty shares in the said Company thereinbefore mentioned, to *John Dyer*; and that the Company might be decreed to make good the same accordingly, out of the estate and assets of the Company; and for that purpose, that all proper and necessary directions might be given.

By the 8th clause of the deed constituting the Company, it was provided, that the chairman of the board of directors, and the secretary for the time being, should be the two officers to sue and be sued on behalf of the Company.

The 11th clause was as follows: "That, whenever such notice as hereinafter is mentioned, by any executor or administrator of a deceased proprietor, desirous of becoming, or having procured some person or persons to become a

proprietor or proprietors in respect of all or any of the shares held by him or her in the Company, in any of those capacities, shall have been left at the principal place of business for the time being of the Company, the board of directors shall proceed without delay to take such notice into consideration; and shall, under the hands of three of the directors, certify in writing to the holder or holders giving the notice, the approbation or disapprobation by the board, of the proposed proprietor or proprietors, and shall, if the person or persons proposed in such notice shall be approved of, in the case of a holder or holders desirous of becoming a proprietor or proprietors, on such application being certified, as aforesaid, or in case of any holder or holders having procured some person or persons to become a proprietor or proprietors, forthwith, on the deed or deeds by which the shares of such holder or holders shall have been transferred, being left at the principal place of business for the time being of the Company, cause his, her, or their name or names to be entered in the share-register book as the proprietor or proprietors of such shares, and shall at the same time cause such entry, erasure, or other alteration, to be made in the share-register book as the board shall think fit, for the purpose of making it appear therein that the last proprietor of such shares, and all persons claiming under him or her, except the person or persons procured to be a proprietor or proprietors in respect of such shares, is or are no longer entitled thereto; and, after such entry, erasure, or other alteration as aforesaid shall have been made in the share-register book, the board of directors shall at any time, if requested by such holder, or by any one or more of such holders, deliver or cause to be delivered to the holder or holders making such request, a certificate in writing of such entry, erasure, or other alteration."

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Statement.

By the 113th clause, it was provided, that shares should



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*Statement.*

be registered in the name of one proprietor only, and not of joint proprietors.

The 165th clause was as follows: "That, whenever any holder or holders of any shares in the Company shall have procured some other person or persons to become a proprietor or proprietors in respect of all or any of the shares held by him, her, or them, in the Company, he, she, or they shall give notice thereof in writing, at the principal place of business for the time being of the Company, and shall describe in such notice the name and residence of the proposed proprietor or proprietors, and the distinguishing numbers of the shares in respect of which he, she, or they shall have procured such person or persons to become proprietor or proprietors."

By the 171st clause it was provided: "That, when and so often as any person, not a purchaser from the board of directors, shall have been approved by the board as a fit person to become a proprietor of any shares in the Company, and such entry, erasure, or other alteration in respect of such shares shall have been made by the board in the share register book, as hereinbefore required, the last proprietor of such shares, and all persons claiming by, from, or under him or her, other than the person so approved as a proprietor, shall, from the time when such entry, erasure, or other alteration shall have been made, have no claim or demand whatsoever, either at law or in equity, upon or against the Company, or any of the proprietors thereof for the time being, other than the person so approved as a proprietor, his or her executors or administrators, for or on account of or in anywise relating to such share or shares, except in respect of the dividends or other profits declared previously to the time when such entry or erasure or other alteration shall have been made; and the certificate of such entry, erasure, or alteration, to be given by the board of directors as hereinbefore required,

shall at all times be evidence of such acquittance and discharge in respect of such shares."

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Statement.

By the 174th clause it was provided, "that every entry, erasure, or other alteration, which, upon the subscription for or the purchase or acquisition of any shares in the Company, shall have been made by the board of directors in the share register book, shall, as between the Company and the last proprietor of such shares, and all persons claiming by, from, or under him or her, be binding and conclusive upon such last proprietor, and all persons claiming by, from, or under him or her. And he, she, or they shall not be at liberty to dispute or call in question the validity of such entry, erasure, or other alteration, or, for the purpose of disputing or calling in question the validity of such entry, erasure, or other alteration, to inquire whether all the rules and regulations hereby required to be observed and attended to, previously to the making of such entry, erasure, or other alteration, had been duly observed and attended to or not; but the last proprietor of such shares, or any person or persons claiming by, from, or under him or her, may maintain any action or suit to which he, she, or they may be entitled, against any person or persons for any act, neglect, or default, through or by reason of which such entry, erasure, or other alteration, may have been improperly made."

By the 175th clause it was provided, "that, previously to the entry in the share register book of the name of any person as a new proprietor of any shares in the Company, it shall not be necessary for the board to inquire whether such shares have been effectually vested in such person or not, it being the intent of these presents, that, if the name of any person should have been improperly entered in the share register book as a proprietor of any shares, such person shall, as between him or her and the other proprietors for the time being of the Company, be a proprietor of the

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Company to all purposes in respect of such shares; and all claims which the last proprietor of such shares, or any person or persons claiming by, from, or under him or her may have in the same, shall be made wholly and exclusively upon and against the new proprietor of such shares, or his or her executors or administrators."

By the 176th clause it was provided, "that the share register book shall, as between the Company and every person claiming to be a proprietor of the Company in respect of any shares in the Company, be conclusive evidence on behalf of the Company that he or she is a proprietor of the Company in respect of such shares; and in the case of every purchaser of shares in the Company, the entry of his or her name in the share register book shall be conclusive evidence, both at law and in equity, of his or her right and title to the shares which he or she shall have purchased."

By the 178th clause it was provided, "that every certificate, indorsement, or memorandum, to be made and delivered by or by direction of the board to every present and future proprietor of shares in the Company, for denoting the proprietorship of such shares as between the Company and such proprietor, shall be conclusive evidence on the behalf of such proprietor that he or she is a proprietor of the Company in respect of the shares to which such certificate, indorsement, or memorandum may relate; and such certificate, indorsement, or memorandum shall continue to be such conclusive evidence, until such entry, erasure, or other alteration as hereinbefore mentioned, shall have been made therein."

The bill, after setting forth the preceding clauses, alleged that the Company had never been incorporated, but had uniformly acted under the deed of settlement of the Company, which had been executed by a large number of the proprietors and shareholders; that *W. Clowes*, previously to his death, became a proprietor, and his name

was duly entered in the share register book of the Company as the proprietor of 100 shares, and at his death he had in his possession the certificates for those shares, duly signed by three of the directors of the Company; that *W. Clowes* died on the 26th December, 1845, and appointed the Plaintiffs his executors; that *John Conquest* (out of the jurisdiction of the Court) was at that time the secretary of the Company; that, in consequence of the provisions contained in the 113th clause of the deed, and the legal title to the said 100 shares being vested in the Plaintiffs, the Plaintiff *W. Clowes*, in July, 1847, by the authority and with the privity and knowledge of the other Plaintiffs as his co-executors, and in compliance with the rules of the Company, brought the certificates for the 100 shares to the office of the Company, for the purpose of having the shares transferred and duly registered in the name of the Plaintiff *W. Clowes*, in the register-book of the Company; and accordingly upon that occasion the Plaintiff *W. Clowes* signed his own name in the transfer book of the Company on behalf of himself and the other Plaintiffs, as executors of the said testator, in the column containing the words, "By whom Ordered," to the transfer of the 100 shares as having been ordered by the executors of the said testator, and also signed his own name, in the column containing the words, "To whom Made," to the transfer thereof to the Plaintiff, *W. Clowes*, and then left the said certificates with the said *J. Conquest* as such secretary, in order that the Plaintiff *W. Clowes* might be registered in the register book of the Company as the proprietor of such 100 shares, which according to the rules and regulations of the Company was necessary to be done before the board of directors would suffer the shares to be so registered; that the Plaintiff *W. Clowes* afterwards called several times at the office of the Company to inquire whether the shares had been registered in his name, and on all such occasions he was apprised by *J. Conquest* that the shares had not

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been registered in his *W. Clowes's* name; that, on the 18th of April, 1848, in consequence of a previous conversation between the Plaintiff *W. Clowes* and *J. Conquest*, *W. Clowes* called at the office of the Company and informed *J. Conquest* that the Plaintiffs would take 9*l.* per share for the 100 shares, and he then for the first time authorised the sale of the shares at that price; that, from the 18th of April till the 25th of May, 1848, the Plaintiffs did not, nor did any or either of them, receive any information touching the said shares or the sale thereof; but on the latter day the Plaintiff *W. Clowes* received a message from the Company, requiring his attendance at their office, and he accordingly attended upon the Company, and was informed by them that *J. Conquest*, on the 18th of May, 1848, had absconded and gone abroad, and that, long previously to his absconding, he had sold 50 of the said 100 shares to *J. Dyer* (who at the time of such sale was an original shareholder in the Company), at the price or sum of 9*l.* 7*s.* 6*d.* for each of the said fifty shares; and that *J. Conquest*, at or shortly after the time of such sale, had received the whole of the purchase-money for the fifty shares from *J. Dyer*, and had fraudulently applied the same to his own absolute use, but that he had left the remaining 50 of the said 100 shares in the drawer of his desk in the said office, which last-mentioned fifty shares were then and there returned by a clerk of the Company and by the direction of one of the directors thereof to the Plaintiff *W. Clowes*; that it appeared from the transfer order-book of the Company, that the fifty shares so sold to *J. Dyer* as aforesaid, were therein alleged to have been transferred to him on the 7th of September, 1847, and such shares were in fact fraudulently sold in manner aforesaid to *J. Dyer*, on or before the 7th of September, 1847, at the then market price of such shares; that, in such transfer order-book, the order of transfer from the Plaintiff *W. Clowes* to the said *J. Dyer*, in the column of the said transfer order-book "By whom

Ordered," is not signed by any one; but in the column of the said transfer order book, "To whom Made," *J. Dyer* had affixed his signature; that it further appeared from the books of the Company, and the facts were, that, at a meeting of the board of directors of the Company, held on the 4th of October, 1847, a minute was made of that date in the directors' book, approving of the transfer of the said fifty shares so sold to *J. Dyer*, and the same shares stood entered in the share register book of the Company as the property of *J. Dyer*, such entry, erasure, or other alteration, as required by the said deed of settlement, having been made in the share register book of the said Company, by the board of directors, in respect of such fifty shares, upon their approval of *J. Dyer* as a fit person to become the proprietor thereof, in the month of October, 1847, or shortly afterwards; that the board of directors of the Company approved of the transfer of the fifty shares to *J. Dyer*, and caused the minute of the 4th of October, 1847, to be entered in their book as aforesaid, without ever having received any notice in writing, or otherwise, from the Plaintiff, *W. Clowes*, of his desire to sell the said shares, although by the deed of settlement it was expressly provided, that notice in writing should be given to the Company by the proprietor selling, of his desire to sell. The bill charged, that the Defendant *Josiah John Luntley*, was the chairman, and the Defendant *William Heath* the secretary of the Company; and that, under the settlement deed, the Plaintiffs were entitled to sue the Company in respect of the matters thereinbefore mentioned, through the said *J. J. Luntley* and *W. Heath*, as such chairman and secretary respectively for the time being of the Company.

The two Defendants demurred to the bill, for want of equity and want of parties, viz. of *J. Conquest* and *J. Dyer*, and the several directors and proprietors and shareholders of the Company. On the 13th of February,

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 Statement.

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*Statement.*

1849, Vice-Chancellor *Knight Bruce* allowed the demurrer generally, and ordered, that the Plaintiffs should be at liberty to amend, on payment of 20s. costs to the Defendants, and that the consideration of the costs of the demurrer should be reserved till the hearing of the cause. From that order the Plaintiffs appealed.

*Argument.*

Mr. Bacon and Mr. W. A. Collins, in support of the appeal, contended, that, as the directors had been guilty of great neglect and want of care with reference to the transfer of the fifty shares the subject-matter of the bill, and the Company was represented by the secretary, the Company were liable to recoup the Plaintiffs the loss that had been sustained by them; that *Dyer*, the transferee of the shares, was not a necessary party to the suit, because, as between him and the Company, the entry in the register book was conclusive evidence, and the shares had, as regarded *Dyer*, been effectually transferred to him; that the demurrer, though in form allowed generally, was in reality allowed on account of the absence of *Dyer*; whereas the Plaintiffs' complaint was not against *Dyer*, but that the acts of the directors were unauthorised, they having power only to effect a transfer in a particular form, and after a communication in writing had been made to them by the owner of shares, and that the Plaintiffs had a right of election, and had by their bill elected to take and accept the purchase-money paid for the shares to the secretary of the Company.

The cases cited in support of the appeal were, *Harrison v. Pryse* (a), *Ashby v. Blackwell* (b), *Davis v. Bank of England* (c), *Hildyard v. South Sea Company* (d), and *Stone v. Marsh* (e).

(a) Barnard. 324.

(b) 2 Eden, 299; S. C., Ambl.  
503.

(c) 2 Bing. 393.

(d) 2 P. Wms. 76.

(e) 6 B. & C. 551.

Mr. *Russell* and Mr. *Miller*, contra, contended, that, with reference to the Plaintiffs, the case remained, as to the fifty shares which had been transferred, the same as it was previously to the transfer; that the erasure might have arisen from the fault of the agent, who acted as much for the Plaintiffs as for the Company; that the Plaintiffs' remedy was against *Dyer* or *Conquest*, who ought to have been parties to the suit.

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—  
Argument.

[The LORD CHANCELLOR.—The Plaintiffs treat *Dyer* as quite out of the field, and as having a title under the deed against the Plaintiffs; the Plaintiffs say they were partners in the adventure, and the Defendants excluded them.]

The 8th clause of the deed did not apply to a case like the present, the Plaintiffs being the representatives of a late partner, and therefore in the situation of a member of the partnership; that the present case was one of pure partnership, to which the cases that had been cited on the other side did not apply; and that the circumstances stated by the bill did not prove the case to be one of damages sustained by the Plaintiffs, there being no allegation therein that the Plaintiffs had ever made any application to the directors to have the fifty shares transferred into *W. Clowes's* name.

*Seddon v. Connell*(a), *Coles v. Bank of England*(b), and *Vandaleur v. Blagrove*(c), were cited on behalf of the Respondents.

Mr. *Bacon* was heard in reply.

The LORD CHANCELLOR, after stating the prayer of the bill, delivered his judgment as follows:—Now, in short,

*Judgment.*

(a) 10 Sim. 58.

(b) 10 A. & E. 437.

(c) 6 Beav. 565.



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—  
*Judgment.*

the prayer is for compensation in damages for a loss, or supposed loss, which has been sustained; which assumes, therefore, that a loss has been sustained through the fault of the Company, and the bill prays that they may be made liable, and that the loss may be made good; not by considering the shares still remaining as the property of the Plaintiffs, but assuming that, having been the property of the Plaintiffs, they have been validly transferred to another person. The bill for that purpose states the articles, the deed of settlement by which the interests of the partners were regulated as between themselves, and who were to share the profits and become entitled to the different proportions for which they were subscribers. And one of the most important of the articles is the 174th. [Here his Lordship read the 174th clause.] Now, that gives validity, or is supposed to give validity, to transactions, provided they are done under the circumstances specified by the deed. The deed provides a certain mode by which the transfer of shares may be made; amongst others is one, which has not been observed, and which probably gave rise to the loss which has been sustained in the present case; namely, that there should be a document containing, in one column, the name of the specific transferror, and, in the other column, the proposed transferee of the shares. It is obvious, that, if that were attended to, the transferee would have seen who the transferrors were; and, at all events, on the face of it, it would appear to be a regular transaction. In this case that was entirely omitted; and that must be matter which must come to the knowledge of the transferee, because he signed that very paper: and if he had tried to inform himself, by looking at the column under his eye, who the transferror was, and if he had taken the trouble of informing himself of the provisions of the deed under which he was to have title, he must have seen that there was an irregularity in the practice, in not having the name of the transferror; that part of the transaction may be considered as brought

home to the party taking the benefit of the transfer. There were various other provisions, all introduced into the deed for the purpose of preventing any fraud or any improper transfer of the shares, which made it more conclusively the duty of the officer of the Company to see that all those provisions were carried into effect. Now, many of them were not carried into effect; and the result was, that it appears that the party who at that time was the secretary of the Company, procured this transfer from the directors, who, without seeing whether the forms had been properly adhered to or not, placed implicit faith in their officer, and signed any paper that was put before them; if the directors had taken the trouble to do what the deed makes it their duty to do, and to see that all the documents were correct which authorised the party to make the transfer, this fraud could not have been practised. However, it was practised; the officer of the Company procured the transfer to be made, and also the entry to be made in the book of registry; the result of which was, that another person, Mr. *Dyer*, became the apparent transferee of the fifty shares.

Now, there are two questions which may arise: first of all, whether the remedy does or does not exist as against this transferee? Secondly, whether the officers of the Company, who were the immediate actors, though not consciously or knowingly, but who were the instruments of the fraud, by not taking care to follow the provisions of the deed, are the persons liable? But the present question is, whether on this bill it appears that the Company are liable for the shares in the form in which the bill seeks to make them liable. The bill, of course, assumes that there is no remedy against the transferee of the shares; the foundation of the Plaintiffs' claim assumes, therefore, that the purchaser, the transferee, has a clear title to the shares; it assumes that there is no remedy against the

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 —  
*Judgment.*

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—  
*Judgment.*

officers of the Company; and that, therefore, the only remedy is against the Company itself.

Now, in the first place, the part to which all the provisions have reference, the authority to which these provisions in the other parts of the deed have reference, is the mode prescribed by the deed in which the transfers shall be made; and those transfers are to be made only in a certain form, and after certain precautions have been taken. In the present case the deed states, that those forms were not observed, and that those precautions were not taken. Whether that is to be considered as a transaction which would bind the Company by the act of one of the partners, a director, not authorised to do what he did, but authorised only to bind the Company if he adopted a certain course of proceeding, and followed certain rules, is a matter which may be for the consideration of the Plaintiffs; but this is a case on the part of one shareholder, on behalf of himself and others jointly interested with him, not claiming to have his shares restored to him, but for damages. Now, damages imply a wrongful act. What has the Company done? The Company has done nothing; their officers have misconducted themselves, according to the statement in the bill, and they have done that which they were not authorised to do; but the partners of the Company cannot bind the Company by an unauthorised act; if it is within the scope of their business, they may bind themselves as regards the public; but if it is not within the scope of their business, then as between themselves, who are all parties to the same deed, it is clear that one partner cannot bind another by an act not authorised by the contract between them. If so, it is impossible to maintain this bill on the general equity; it must be shown clearly that the directors, those who did this act, did it under certain rules which bound the Company; but as it stands, there is an absence of statement to bring

my mind to the conclusion that that case is made out; but if that were so, if the party has lost his property, and lost his property by the negligence of the Company, supposing the Company to be the actors, what is the effect, according to the cases cited? Not that they have done an act which they had no authority to do. Now, in the case of *Ashby v. Blackwell* (a), the Company were considered as liable,—they, and not their officer,—they being the parties to make the transfer.

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Judgment.

I have looked through the bill since the case was argued, to see whether there was a statement that this was the act of the Company; it is distinctly stated not to be the act of the Company, but it is stated to be an unauthorised act of the agent of the Company. Now, the moment it is said to be an unauthorised act of the officer, and not of the Company, the authority must be admitted to prevail. What was the remedy in *Ashby v. Blackwell*? Because the Company there had done an unauthorised act, it was considered by the Court, that the thing itself was not done, and the Court restored the party to the property which apparently for the time had been improperly taken from him. That is not the object of the present bill. Its object is, assuming that the transaction is valid, to ask that the Company may pay compensation in damages. No case has been cited in which that has been done, or attempted to be done; and without at all saying, that the Plaintiffs are without remedy, or means by which they may be restored to the property which has been fraudulently taken from them, I am clearly of opinion that this bill does not state such a case, as entitles the Plaintiffs to the relief sought by it; and therefore, on the general equity the demurrer is good.

I need not take any notice of the other question, as to the want of parties, because in this view it becomes

(a) 2 Eden, 299; S. C., Amb. 503.

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*Judgment.*

immaterial; but I cannot help observing, that, according to the cases cited, Mr. *Dyer* is not in the situation of being a necessary party. If the bill had questioned *Dyer's* interest in the purchase, he would be a necessary party; but according to the allegations contained in the bill, if there be any equity, it is against the Company for damages, on the ground of Mr. *Dyer* being entitled; and therefore, if the case turned on the question of parties, I should have been of opinion that Mr. *Dyer* was not a necessary party; but it is perfectly clear, that, upon the case as it stands on the bill, there is not equity to support it.

Now the order of the *Vice-Chancellor* gives leave to amend; that is not very usual where the demurrer is allowed for want of equity; at the same time, the Plaintiffs have obtained a benefit by the order, which I do not feel disposed to take from them, particularly when I see the possibility, at least, of the case being so altered by amendment, as to raise a grave question, how far they may not be entitled to some relief. The order below will be affirmed, with costs.

1850.  
*Feb. 14th & 16th.*

THE GRAND JUNCTION CANAL COMPANY  
 v. DIMES.

An incorporated trading Company filed a bill against the lord of a manor, and obtained an injunction against him to restrain him from taking possession of certain land to which he had established his right at law. A motion to dissolve the injunction was afterwards refused by the *Lord Chancellor*. At the hearing of the cause the injunction was made perpetual, and a decree was made in favour of the Plaintiffs, which decree was afterwards affirmed by the *Lord Chancellor*, on appeal. The Defendant was committed for a breach of the injunction. An application to discharge the order for committal, and the decree on the re-hearing, and to take the bill off the file, on the ground that the *Lord Chancellor* was a shareholder in the Company, was refused, with costs.

THIS was an application on behalf of the Defendant *Dimes*, and it was heard by the *Lord Chancellor*, assisted by the *Master of the Rolls*.

Under an order of the *Vice-Chancellor of England*, of the 10th of December, 1849, *Dimes* had been committed to

the Queen's Prison for breach of an injunction; and this was a motion on his behalf that that order might be discharged or varied, and also that a notice of motion dated the 24th of February, 1849, and still pending, might be finally disposed of, and an order made pursuant to the terms thereof; or that an order of the *Vice-Chancellor of England*, of the 2nd of June, 1849, refusing a motion then made by *Dimes*, might be discharged; or that the bill in this cause might be taken off the file, with costs to be paid by the Company; or that all further proceedings might be stayed.

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The bill was filed in June, 1838, under the following circumstances. The Company were incorporated by an Act 33 Geo. III, c. lxxx, by which they were empowered to purchase lands for the purposes of their canal. By a deed poll, dated in March, 1797, and made in the form prescribed by the Act, they took a conveyance from *Joseph Skidmore* of certain pieces of copyhold land, held of the manor of *Rickmansworth* in *Hertfordshire*, of which *Skidmore* was the copyhold tenant, and for which they paid him 308*l.* 10*s.*; and they afterwards carried the canal and the towing-path across part of those lands. No surrender was made upon that occasion, nor was any agreement come to with the lord of the manor respecting the purchase of any of his rights: but the Company took a bond of indemnity from *Skidmore* against all rents and services which might be claimed by the lord.

In 1831 the Defendant *Dimes* purchased the manor of *Rickmansworth*, and in 1835 *J. Skidmore* died, leaving *Thomas Emmott Skidmore* his heir, according to the custom. Some communications took place between *Dimes* and the Company, who claimed to be entitled to the land absolutely. *Dimes* then issued proclamations according to the custom, and after due proclamations had been made, insisted upon his right to take possession of the land; and,

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in 1836, he brought an action of ejectment against the Company, which was ultimately, in 1838, decided in his favour. The Company, however, insisted that they were not bound to purchase the interest of the lord; and that, though *Dimes*, as lord of the manor, was entitled to have a tenant on the court rolls in respect of these lands, the Company could require *Dimes* to admit the heir of the last tenant, or some other persons on their behalf; and they accordingly applied to him to admit a trustee for them (a), upon payment of the usual fees and fines; and upon *Dimes*' refusal they filed this bill, praying that he might be decreed to admit the Plaintiffs, or *T. E. Skidmore*, or such other person as they should appoint, to the copyholds; and also submitting to purchase, if necessary, the interest of the Defendant as lord of the manor; and also praying an injunction to restrain the Defendant from obstructing the passage of boats along the canal or injuring the navigation thereof. An *ex parte* injunction was granted by the *Vice-Chancellor of England*, immediately afterward, and was continued to the hearing, by an order of the 26th of July, 1838. A motion, by way of appeal to the *Lord Chancellor*, to dissolve the injunction, was heard on the 15th of December, 1838, and was refused; but the

(a) The allegation in the bill was, that, although *Dimes* might be legally entitled to recover the said copyhold premises, the Plaintiffs were entitled to have *T. E. Skidmore* admitted in trust for them; and that they had applied to *Dimes* to admit him, offering to pay all usual fees and fines, but that *Dimes* refused.

In the affidavit sworn on behalf of the Company in support of the application for the injunction, it was stated that they had applied to *Dimes* to admit *their trustee* [*T. E. Skidmore* not being named]; and, afterwards, that *T. E. Skid-*

*more* was an infant when the proclamations were made. But from the affidavit of *Dimes* in opposition, it appeared, that, during the month of June, several communications took place between him and the Company, and that the Company were then desirous of having another person admitted as their trustee. After the injunction was granted, they applied to *Dimes* to admit *T. E. Skidmore*. This incorrect allegation was one of the grounds on which the Defendant insisted that the *ex parte* injunction ought to be dissolved.

order of the *Vice-Chancellor* was varied with regard to one part, which directed a sum of money to be paid into Court by the Company. A writ of injunction was issued on the 6th of July, 1839, and, upon the hearing of the cause, in 1846, the injunction was made perpetual, and a decree was made in accordance with the prayer of the bill. The case is reported in 15 Sim. 402. The Defendant appealed to the *Lord Chancellor*, but the judgment was affirmed in January, 1848. An action of trespass for mesne profits was afterwards brought by *Dimes* against the Company, in 1840, which was ultimately decided in his favour: 9 Q. B. Rep. 469 (a). The general result, therefore, of the litigation between the parties was, that the Company [their bill containing such allegations as have been mentioned] had been successful in equity, but *Dimes* had been successful at law.

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After the decision of the *Lord Chancellor*, and while a petition of appeal to the House of Lords was in preparation, *Dimes* discovered that the *Lord Chancellor* was a shareholder in the *Grand Junction Canal Company*. His Lordship was, in fact, the holder of seventeen shares in his own right, and of seventy-five other shares in a fiduciary character; and he had also an interest in some of the latter shares. In consequence of these circumstances, and on the 16th of February, 1849, *Dimes* presented a petition to the Queen, praying that her Majesty would cause such directions to be given for the hearing and determination, in the Court of Chancery, of the Defendant's petition of rehearing and appeal, and, so far as might be necessary, of that petition, as her Majesty should be advised were in

(a) The case was heard in the first instance before the Court of Queen's Bench, which decided in favour of the Company. It then came before the Exchequer Chamber, on a writ of error; but Mr. Baron *Alderson*, who was one of

the Judges present, stated, that he was a shareholder in the Company, and, upon that ground, the case was postponed till the next sitting, when Mr. Baron *Alderson* did not attend.



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accordance with right and justice towards the Defendant and the other parties.

After some communications between Mr. *Dimes* and the *Lord Chancellor's* Secretary, this petition was not proceeded with; but *Dimes*, on the 24th of February, gave notice of a motion that the order made by the *Lord Chancellor*, on the hearing of the appeal in January, 1848, might be discharged, and that the petition of appeal might be amended in the manner mentioned in the petition, by adding parties; and that proper directions might be given by the Court, by the issuing a commission, or otherwise, as might be necessary, for the hearing and determination of the said petition of appeal before the *Master of the Rolls*, assisted by two Judges of the Courts of common law. This motion was heard before the *Master of the Rolls*, at the request of the *Lord Chancellor*, in May, 1849, when his Lordship stated that he should advise the *Lord Chancellor* that the motion ought to be refused, with costs<sup>(a)</sup>. No order was, however, drawn up upon it; and this was the motion which the present application asked to have now finally disposed of. Immediately before the commencement of the argument on the present application, the *Lord Chancellor* directed an order to be drawn up in accordance with the view of the *Master of the Rolls*, suspending, however, that part of the order which interfered with the present notice of motion.

In order to raise the question as to the propriety and validity of these different orders, the Defendant had given to the Company notice not to trespass; and in June, 1849, he commenced an action of trespass against them. The Company thereupon moved before the *Vice-Chancellor*, to commit the Defendant for a breach of the injunction, or, in the alternative, for an injunction to restrain him from

(a) 12 Beav.

proceeding with the action. A cross motion was also made on behalf of the Defendant, that the bill might be taken off the file for irregularity. The *Vice-Chancellor* considered that no breach of the injunction had then been committed, and therefore made no order for committing *Dimes*: and at the same time his Honor refused the cross motion of the Defendant. This was the order of 2nd June, 1849, which the present application sought to discharge.

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In November, 1849, *Dimes* placed a chain across the canal, so as to impede the navigation; and a motion being consequently made by the Company, before the *Vice-Chancellor*, on the 10th of December, 1849, for the committal of the Defendant, his Honor made an order accordingly; and this was the order which the Defendant now sought to discharge.

On the 11th of January, 1850, the Defendant was arrested, and handed over to the keeper of the Queen's Prison. On the 14th of January, an application was made to the Queen's Bench for a *habeas corpus*(a), and a writ was issued accordingly. The keeper of the Queen's Prison made a return, stating that the Defendant was detained by virtue of a writ founded on an order of the *Vice-Chancellor*; so that the real question, whether the order of the *Lord Chancellor* was or was not valid, was prevented from being raised; and the Court thereupon held, that no ground was shewn why the Defendant was entitled to be discharged.

Mr. *Daniel* and Mr. *Smythies*, in support of the motion

Argument.

The principle upon which this application is founded, is, that an undisclosed pecuniary interest in the subject-matter of any litigation creates a personal incapacity in a

(a) Mr. Justice *Wightman* stated, that he was a shareholder in the Company, and he therefore took no part in the case, and was considered as virtually absent from the Court.

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Judge to determine any question relating to such litigation. Any proceeding in such a case is *coram non iudice*, and any order or judicial act of a Judge, so interested, *in invitum*, is void.

This rule is established, as much for the protection and satisfaction of the Judge, as it is for the sake of the suitor. In Rolle's Abr., tit. "Judges," (A.), pl. 11, it is stated: "*Si le Seigneur Chancellor fait un decree enter 2 estrangers en un chose que concerne luy mesme en interest, et pur luy mesme, ceo est void pur ceo que il ne poet estre un Judge en son cause demesme.*" That resolution is founded on *Lord Derby's case* (a), and the case of *The Chancellor of Oxford* (b). The case referred to in Rolle is an authority that the order is void where the Judge decides in his own favour. In the case of *Great Charte v. Kennington* (c), the Court held, that a magistrate could not make an order for the removal of a pauper from a parish in which he had property, because he had a pecuniary interest in the question, from his liability to contribute to the support of the paupers. That decision was given after a contrary practice had prevailed for eighty years; and the 16 Geo. II, c. 18, was passed, to confer that power upon magistrates which the application of the ordinary principle deprived them of. In an *Anonymous case* (d), "the Mayor of Hereford was laid by the heels for sitting in judgment in a cause where he himself was lessor of the Plaintiff in ejectment, though he by the Charter was sole Judge of the Court:" *Brookes v. The Earl of Rivers* (e), *The King v. The Inhabitants of Yarpole* (f), *The Queen v. The Commissioners for Paving &c. the Town of Cheltenham* (g). In *The Queen v. The Justices of Hertfordshire* (h), it was held, that, if any one of the magistrates, hearing a case at Sea-

(a) 12 Rep. 114.

(b) Bl. Com. Vol. 3, p. 299, n.;  
S. C., Year Book, M., 8 Hen. VI, 20.

(c) 2 Str. 1173.

(d) 1 Salk. 396.

(e) Hardres, 503.

(f) 4 T. R. 71.

(g) 1 Q. B. Rep. 467.

(h) 6 Q. B. Rep. 753.

sions, be interested in the result, the Court is improperly constituted, and an order made in the case will be quashed on certiorari. It was no answer to the objection, that there was a majority in favour of the decision, without reckoning the vote of the interested party, or that the interested party withdrew before the decision, if he appeared to have joined in discussing the matter with the other magistrates.

The same principle is recognised by the legislature in the Lands Clauses Consolidation Act (a), where a sheriff, who is interested in the subject of the dispute, is disqualified from presiding over an inquisition to ascertain the value of the lands.

Suppose a Recorder of a municipal town, or a Stipendiary Magistrate, or a Judge of a County Court, decided a case where the dispute was between some individual and a Joint-stock Company, and it was afterwards discovered that the Judge was a member of the Company, would the principle of the Courts, or would public feeling, allow a party so interested to act as judge in his own cause? In *Esdaile v. Lund* (b), a shareholder in a Bank was considered as an unfit person to be a juryman upon a trial in which the interests of the Bank were concerned: *The Queen v. The Inhabitants of Upton St. Leonards* (c). In *Lord Mostyn v. Spencer* (d), depositions were suppressed after publication, on the ground that one of the Commissioners was an agent of the Plaintiff; and that, although the witnesses were dead, and the evidence could not be replaced. No case could shew more forcibly the stern and inflexible principle of this Court. In this case the *Lord Chancellor* could not have acted as a juryman, nor, until Lord *Denman's* Act (e), could he have been a competent witness. But when the trial

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(a) 8 Vict. c. 18, s. 39.

(b) 12 M. & W. 734.

(c) 10 Q. B. Rep. 827.

(d) 6 Beav. 135.

(e) 6 & 7 Vict. c. 85.

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at law is over, and the Defendant has a verdict, the *Lord Chancellor* acts as a Judge in the case, and restrains the Defendant from having the benefit of his legal rights(a).

The *Master of the Rolls* in his judgment stated, that the only ground of the application before him, was the fact that the *Lord Chancellor* was interested in the subject-matter of the suit. The law of *England* is a law of jealousy. In many relative positions, a disability to contract is created, not on the ground of impropriety of conduct, but merely in consequence of that relation: *Rothschild v. Brookman* (b). The positions of guardian and ward, of trustee and *cestui que trust*, are subject to the same rule. But the *Master of the Rolls* observed: "He has a strange notion of things, who supposes such an interest to be capable of producing any bias in the mind of a judge administering justice in public, and subject to appeal, in a matter having no direct or special relation to the value of such shares." The order in the present case has a direct effect upon the value of the shares: but even with that qualification, the old authorities are opposed to this doctrine. A noble mind may wish to reject the probability of such influence; but the law respects the infirmity of human nature, and guards against it, both for the judge, and for the suitor. The objection is no doubt technical in form; but it involves a fundamental principle for securing the administration of justice.

(a) In Kent's Commentaries on American Law, Vol. 1, p. 420, is the following passage:—"We cannot but admire the intrepidity and powerful sense of justice which led Lord Coke, when Chief Justice of the King's Bench, to declare as he did in *Dr. Bonham's case*, (8 Coke, 118), that the common law doth control Acts of Parliament, and adjudges them void when against common right and reason. The same sense of justice and free-

dom of opinion led Lord Chief Justice Hobart, in *Day v. Savadge*, (Hob. 87), to insist, that an Act of Parliament made against natural equity, as to make a man judge in his own case, was void; and induced Lord Chief Justice Holt to say, in the case of *The City of London v. Wood*, (12 Mod. 687), that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying."

(b) 5 Bligh, 165.

The *Master of the Rolls*, when the motion was before him, admitted that principle, but considered that it must give way to prevent a denial of justice; and that, as the *Lord Chancellor* was the sole Judge in the Court of Chancery, he was bound to hear this cause when it came before him, because, if he had refused to do so, the parties would have had no means of obtaining justice. But when *Dimes* applied on *habeas corpus*, to a Court of common law, the Court held that they could not interfere, because the order in consequence of which he was imprisoned had been pronounced by the *Vice-Chancellor of England*. If the *Lord Chancellor* had been the sole Judge, the order for *Dimes's* arrest and committal ought to be treated as his Lordship's order.

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But assuming that point, that the *Lord Chancellor* is the sole Judge, then the case is brought within the rule, that the bill ought to have been addressed, not to the *Lord Chancellor*, but to the Queen in Chancery.

In the *Discourse of the Judicial Authority of the Master of the Rolls* (a), it is stated, that the rule that the King never interferes in the administration of justice, except by the Judges, is departed from where there is only one Judge, and that Judge is interested in the subject-matter of the dispute; and where the *Lord Chancellor* is the Judge who is interested, the bill should be addressed to the King, and the *Master of the Rolls* may hear and decide the case. And in Mitford's Pleading (b), the rule is laid down in terms which are equally general. It is not stated that the *Lord Chancellor* must be a party to the record. A witness who was incompetent to give evidence on the ground of interest, was not necessarily a party to the record. In a suit by an executor to recover an equitable debt, his *cestui que trust* is a party interested, but he is not a party to the record. Yet he would not be a fit or

(a) Page 178 et seq.

(b) Page 7.

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proper person to determine such a dispute. But the *Master of the Rolls* said, he apprehended that the bill "could not have been properly addressed to the Queen in the Court of Chancery, because the *Lord Chancellor* was not a proper party to the suit." The motion before the *Master of the Rolls* did not seek to have the bill taken off the file: and it was then contended against the Defendant, that if the Defendant's argument was well grounded, he should have applied to have the bill taken off the file.

The *Master of the Rolls* proceeded in his judgment to state, that any order of the *Master of the Rolls* or any Vice-Chancellor must be signed by the *Lord Chancellor*, and became, in fact, his order; and that if the *Lord Chancellor* could not in such a case as this make any judicial order, there would be a failure of justice; but if the bill had been addressed to the Queen, no difficulty would have arisen. Then the case was put of the British Museum, and it was asked, whether a Lord Chancellor was unable to adjudicate in any case in which that institution was involved. The *Lord Chancellor* is a trustee of the Museum under an Act of Parliament; and if a duty is thrown upon him by an Act of Parliament, it amounts to an enactment, that, in such a case, he shall act as a judge. It is the same in principle as the Act of 16 Geo. II, c. 18, with reference to magistrates.

The *Master of the Rolls* held, that the signature by the *Lord Chancellor* to a decree of the *Vice-Chancellor*, was not a ministerial act, but was of a judicial character, and that nothing but an Act of Parliament could give Mr. *Dimes* the relief which he asked. But the consent of the Company to have the cause reheard would be sufficient; taking the bill off the file would be sufficient; there is no defect of power in the Court. It was said, that, if the *Lord Chancellor* had made no order on the petition of appeal, there would be a denial of justice. But that also applies

only to the record in its present form. If it had been addressed to the Queen, the result would have been different. Even in its present form, if the fact that the *Lord Chancellor* was a shareholder had been known, and the Defendant had still consented that the cause should be heard before him, the Company would not have been allowed to refuse to go on with the hearing, and the order of the *Lord Chancellor* would not have been a nullity. The consent of a party cannot give jurisdiction; but if the objection is merely to the exercise by a particular individual of an undoubted jurisdiction, then the objection may be waived by the party: *Ex parte Baddeley*(a). If, however, the *Lord Chancellor* is the only Judge in Chancery, that principle must be acted on through the whole argument. The Defendant is in prison for disobeying an injunction. That injunction must be taken to be the injunction of the *Lord Chancellor*, not of the *Vice-Chancellor*. In the same way the decree must be regarded as the decree of the *Lord Chancellor*, though the cause was heard by the *Vice-Chancellor*; and then, after obtaining the decisions of the Courts of common law in his favour, the Defendant is restrained from having the enjoyment of that which the law declares to be his own property, by an injunction, granted by one of the co-Plaintiffs, who happens to be the *Lord Chancellor*. If his Lordship had been a member of an unincorporated copartnership, he must have been named as a co-Plaintiff, and he could not have decided in his own favour; but the Legislature, when it granted the privilege of incorporation, never intended to allow one of the shareholders to sit as judge in their own causes: *Sinclair v. Sinclair*(b).

It is not a proper matter of judicial discretion whether a judge shall make an order in such a case. Lord Camden says(c):—"The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it

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(a) 5 Railw. Cas. 542.

(b) 13 M. & W. 640.

(c) Lord Campbell's Lives of the  
 Chancellors, Vol. 1, p. 13, n.



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is casual; and it depends upon constitution, temper, and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable." The principle of the administration of justice is one "*quod neque inflecti gratiâ, neque perfringi potentiâ neque adulterari pecuniâ possit*" (a). *Carus Wilson's case* (b).

The Company knew, when they commenced this litigation, that the *Lord Chancellor* was a shareholder. They ought, therefore, to have addressed their bill to the Queen. It would then have been heard before the *Master of the Rolls*, and his decree would not have been even signed by the *Lord Chancellor*, but would have passed under the sign manual; and if the Defendant wished to appeal from it, he might then have gone direct to the House of Lords. But in this case the Defendant is in prison, and he is *ex necessitate* driven to apply to this Court, and this Court may discharge its own order. The Company might have so framed their record, by addressing it to the Queen instead of to the *Lord Chancellor*, that no such difficulty would have arisen.

If a decision of a magistrate is questioned, on the ground that he was interested in the subject-matter on which he has adjudicated, the propriety or impropriety of the order is not material. An appellate jurisdiction has no means of deciding upon a case, where the conduct of the Judge is the point in question, because the facts of the case do not appear on the record. The 17th of Lord Bacon's *Maxims* is, "*De fide aut officio judicis non recipitur questio, sed de scientiâ, sive sit error juris sive facti.*" In *Bridgman v. Holt* (c) it was contended, that a Judge had done wrong in refusing to seal a bill of exceptions; but that was collateral matter, which did not appear on the record; and the House of Lords, as an appellate tribunal, could not inquire into

(a) Cicero, Orat. pro A. Coec.

(b) 7 Q. B. Rep. 984.

(c) Shaw. P. C. 111.

it. The question, therefore, whether this order was void, in consequence of the *Lord Chancellor's* interest in it, would not be raised by an appeal to the House of Lords.

There has been here a miscarriage, and this Court must have the means of correcting its own error. The Defendant is imprisoned for breach of an injunction, which is, in fact, a nullity, because the Judge, being an interested party, had no power to grant it. And the language of Lord *Eldon* in such a case was, "The order has been made, and must be obeyed; but on an application against persons guilty of a breach of it, the Court would forget its duty if it did not give to them the benefit of the fact that the order ought not to have been made" (a).

The *Master of the Rolls* in his judgment said, that, "if the *Lord Chancellor's* order, affirming the decree of the *Vice-Chancellor* at the hearing of the cause, were discharged, the decree of his Honor would remain in full force, and the position of the parties would not be in any material degree affected." But if that order were discharged, the petition of rehearing would be undisposed of, and the Defendant might then have it heard before an unobjectionable tribunal, and he would be in the position of having a Vice-Chancellor's decree against him, but with a petition of rehearing duly presented against it. The *Master of the Rolls* also stated, that that was an attempt to get the order "discharged on motion without a rehearing." But the object of the Defendant is to have a rehearing before a competent tribunal.

Mr. *Stuart*, Mr. *J. Parker*, Mr. *Busk*, Mr. *Randell*, and Mr. *G. L. Russell*, for other parties, were not called upon.

THE MASTER OF THE ROLLS.—Certainly it would have been a very great satisfaction to me, if I had heard anything in the course of this long argument which could induce me

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to think that Mr. *Dimes* was at this time entitled to any relief. It cannot be a satisfactory thing to any Judge to have the notion, that, under an order which he has made, or which he sanctions, a party is imprisoned, and thinks himself to be imprisoned unlawfully. I confess, however, that, in the course of this argument, I have heard nothing which tends in any degree to vary the conclusion which I came to upon the motion that was made before me at the Rolls; and I have heard nothing which induces me to think that the altered relief which is asked for by this notice of motion ought to be granted.

Mr. *Dimes* is in prison, under an order made by the *Vice-Chancellor of England*, followed by the signature of the *Lord Chancellor*; and by the warrant of apprehension, which was signed by the *Lord Chancellor*, for the breach of an injunction, which was granted on the 6th of July, 1839,—an injunction to restrain him from interfering with the navigation of the *Grand Junction Canal*; that he has interfered, and interfered in direct violation of that order and of the injunction, is so far from being denied, so far from being attempted to be excused, that it is attempted to be justified, on the ground, that the order, and the injunction founded upon it, were both of them illegal, and such as he is under no obligation to obey. If he had come here, stating, as I have understood, what he alleges to be the fact, that his object in committing that act of disobedience was, in order that he might obtain the opinion of a Court of law upon the legality of the proceedings here, and that he had made the attempt to get that opinion, and failed in procuring it,—if he had done that, and then suggested, that, for the disobedience to this Court, he may have suffered sufficient punishment, certainly I should have felt most strongly inclined to give my humble opinion to the *Lord Chancellor* that he might be released, not thinking myself that it would be right, or in any degree necessary for maintaining the authority of this Court, that

an imprisonment suffered under such circumstances should be unnecessarily prolonged—I will not say, for a day—but for an hour. However, that is not the course which he has adopted. He comes here, avowing and justifying, and, I am afraid that I am obliged to say—for I cannot get an answer to the contrary—continuing, and intending to continue the disobedience. If I could have his authority to state the contrary, I should be extremely glad to withdraw that observation. It would give me very great satisfaction indeed to do so.

Then the question comes simply to this, whether the proceedings have, under the circumstances, been legal or illegal. Now, I do not think I have heard anything whatever upon this, however ably and at great length this question has been argued to-day, that tends in any degree to alter the opinion that I have expressed at the Rolls. The inconvenience which may come from this cannot very easily be doubted; the necessity of interfering in some cases cannot be very easily doubted. But I regret, as altogether unwarranted, the notion that I have ever said that the *Lord Chancellor* had a discretion, to be exercised at his pleasure, whether he will or will not hear such a case as this, or any other discretion than that which is accompanied by all the responsibilities which affect a Judge. Seeing, therefore, no reason to alter that opinion, I must take the liberty of now again advising his Lordship to make the order pursuant to the recommendation which I then submitted to him, and that for the same reasons which were offered at the time, and which have been, I must say, without the least impropriety, discussed at so much length by Mr. *Daniel*. I was surprised to find it supposed that I had admitted, that, under any circumstances, the *Lord Chancellor* was incapable to make an order. I never said anything which would in any way justify any person in making that statement. I do not know that there is any occasion whatever for me to repeat

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or to vary the language in which my opinion was expressed on that occasion. I adhere to it. I desire nothing for that judgment but that it may be construed according to the ordinary meaning of the terms which are expressed; and, for the reasons there stated, which I see no reason to alter, I now take the liberty of recommending to his Lordship to make the order which I then recommended.

There is another point in this application which I do not by any means wish to pass over, which was not at all before me at the Rolls, which is, that this bill may be taken off the file. Now, I do not think that it would be a proper order to make. Why should this bill be taken off the file? The reason which is alleged at the bar is, because the bill was not addressed to Her Majesty in her Court of Chancery. Certainly I have heard no authority for that; certainly I have heard no reasons which seem to me sufficient to warrant the Court in interfering at this period of the cause by any such order as this; and I cannot recommend that course to be taken. A great part of this case really seems to have been argued as if Mr. *Dimes* had no means of getting justice. Certainly it is very difficult to maintain that argument when it comes simply to this point, whether he is to obtain a re-hearing in the Court of Chancery, or to submit to the decree such as it is. Now, there is no such point at all raised.

Another argument which was raised, adopted, I think, from the proceedings in the Court of law, is this, that as this is not an objection appearing on the record, it is not an objection which could be brought before a Court of appeal. I think I understand it so; but I consider that to be entirely a mistake. It is a mistake in likening the proceedings in the Court of Chancery to the proceedings in a Court of law. I do not exactly know what was the result of the case of *Bridgman v. Holt*(a); but it does not

(a) Show. P. C. 111.

apply here; and for this reason: there is not the least doubt that Mr. *Dimes* has a perfect right to appeal from the decree, and from any orders made in this Court, to the House of Lords. To enable him to do that, nothing is wanting but the inrolment, which inrolment, I take the liberty of saying, I think it would be the duty of the *Lord Chancellor* to warrant, in order that the party may appeal from the decree, whether it is the *Vice-Chancellor's* decree, or that decree, as affirmed by the *Lord Chancellor*, dismissing the petition of re-hearing. This is true of that decree, and it is equally true of the order to be made now. Every order which is made on petition or motion, or in any other mode in which this Court can interfere, is subject to an appeal to the House of Lords; and, therefore, if the order which is now to be made by his Lordship should be an order of which Mr. *Dimes* has reason to complain, he has nothing to do but to procure the inrolment of the order, and upon the inrolment he may carry the questions raised on these occasions, as well as the questions raised on the merits of the case, both of them to the House of Lords; and the whole matter must come under the consideration of the House of Lords, in which he will have the advantage of every objection which can be taken on the merits of the cause, and every objection which is taken for want of technicality in the proceedings. It is, therefore, the grossest mistake to suppose that there is no remedy, if it is not given in the way Mr. *Dimes* asks. There is not, and cannot be any question about it. All that passes here, and every order that is made here, must be subject of course to appeal; and if Mr. *Dimes* is in any way aggrieved by the orders which are made, no doubt he can have redress in that, the highest tribunal the country affords, and his remedy is perfectly free from any such objection as is raised on the present occasion.

One other observation I wish to make on the course which Mr. *Dimes* has adopted; a decree which is once re-

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heard by the *Lord Chancellor*—a decree of one of the subordinate Judges—usually finishes there in the Court of Chancery. If it gets inrolled, it proceeds to the House of Lords; but, it is by no means without example, that a decree made on a re-hearing by the *Lord Chancellor* should, if the circumstances of the case require it, be heard over again. There are instances of re-hearings of decrees made upon a re-hearing; and, if the specialties of the case require it, that might be done; and, therefore, I think it was I asked once or twice below, “Is it the case here, that Mr. *Dimes*, being dissatisfied with the order made on the re-hearing, wishes, under the special circumstances which have come to his knowledge, and which he now represents to the Court, to have another re-hearing without more?” No; he did not wish that: his motion was not that it might be re-heard by the *Lord Chancellor*, with such assistance as the constitution of the Court would enable him to get; but that there might be a commission issued for the purpose of hearing it before the Master of the Rolls and the Judges of the Court of common law; which, I believe, is quite beyond the power and authority of the *Lord Chancellor* to grant. But it has never come forward in that simple form in which it might have been brought forward; namely, Mr. *Dimes* being, under the circumstances which he described, dissatisfied with the order made, was desirous that there might be another hearing granted to him under the special circumstances of the case. It never came forward in that form. His application to me ended in this, that the case was to be restored to the paper of the *Lord Chancellor*, subject, of course, to all the objections which he had raised against any proceeding whatever by the *Lord Chancellor*.

Now, then, thinking for myself, that there is no reason—being unable to see any reason—for altering the opinion I gave; thinking that there is no ground for the application to take the bill off the file, and being fully persuaded, at the same time, that Mr. *Dimes* is not in

the least degree without redress, if he is suffering any grievance, but that the merits of the case, as well as the propriety or impropriety of the order now made, may both be brought under the consideration of the House of Lords, on an appeal properly framed for the purpose; and thinking that Mr. *Dimes* has not applied even for a rehearing under circumstances under which it could be granted,—under all these circumstances, I think I am bound to give my humble advice, that this motion be refused, and refused with costs.

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—  
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THE LORD CHANCELLOR:—

I am much indebted to the *Master of the Rolls* for the assistance which he has afforded me in hearing this application. And it is not my intention to enter at all into the subject that has been discussed at so great length, at the bar, or to make any observations on the conclusion to which his Lordship has come. Having asked for his assistance, because my own jurisdiction was disputed, or at least the propriety of my entertaining any judicial function upon the subject of this matter, I should be undoing the act which I thought proper to adopt, of requiring his assistance, if I should at all interfere with, or should hesitate to adopt the advice which the *Master of the Rolls* has tendered to me. Certainly I have, however, the satisfaction of feeling that the opinion he has expressed is precisely the same as I should myself have entertained, if I had taken on myself to have delivered the judgment without his assistance. [His Lordship then referred to the communications between his Secretary and Mr. *Dimes*, before Mr. *Dimes* gave notice of the motion which was heard before the *Master of the Rolls*.] Having stated so much, without at all interfering with the view which the *Master of the Rolls* has taken of the merits of the case, or entering into them, I will only state, that difficulties may exist,—and difficulties no doubt they are,—arising from the jurisdiction I am called on to execute, having the sole power



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of that jurisdiction, as the learned Counsel properly assumes, in this Court,—difficulties may arise where there is an interest. If the *Chancellor* is a *party*, there is no difficulty; the law has provided for it; but if there be merely an *interest*, that would necessarily make him wish to avoid the duty of adjudicating between the parties, and undoubtedly he would always be anxious to find other Judges to take that burthen from him, where there was the slightest suggestion by either party that his judgment would be influenced by having that interest. Difficulties enough arise from the position in which the *Chancellor* is placed: but I think there would be a much greater evil in adopting the remedy suggested by the learned Counsel, namely, that, when the fact is known, the *Chancellor* may have jurisdiction if one party asks him to exercise it, but cannot have it if the other party make a similar request.

Now I will put the present case:—A cause takes a certain course. A decree is made, or an order for an injunction is made. Suppose there is no order for an injunction. The cause goes on in regular course, and is heard, by the *Vice-Chancellor of England* we will suppose, as was this case. Then, and then only, I will suppose the opposite party, Mr. *Dimes*, for instance, discovers that the *Lord Chancellor*, who at that time may have heard nothing whatever of the case, is a shareholder in the Company litigant with him. Why, then, according to the argument, if Mr. *Dimes* is dissatisfied with the decree of the *Vice-Chancellor*, the cause is to go on; but if the other parties are dissatisfied with the decree, they have no remedy, unless Mr. *Dimes* thinks proper to give the jurisdiction. Now that cannot possibly be the state of the law. It must either be that there is no jurisdiction at all, and that the whole matter is void from the beginning, or that, owing to the constitution of the Court, the jurisdiction can only be exercised in the way in which it has been exercised here, namely, by the *Lord Chancellor* assuming it. He cannot

assume it for one party and refuse to assume it for the other.

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In the present case, however, I have this satisfaction, that if anybody may suppose that the interests of Mr. *Dimes* have been prejudiced by my having shares in the *Grand Junction Canal*, in point of fact the position of the right and the position of the property is not in the slightest degree affected by anything I have done. This stands entirely on the injunction granted by the *Vice-Chancellor*, which remains untouched. I did not think, upon the merits, it ought to be touched; but if I had had the pleasure of Mr. *Dimes*' acquaintance before, I should undoubtedly, when the matter came before me, have declined to interfere. Then the injunction would have remained. Again, at the hearing, the cause came before the *Vice-Chancellor*, and the decree was made. That decree remains. All that I have done in the cause is to leave the orders of the *Vice-Chancellor* untouched. So that, if the proceedings are wrong—if the injunction was wrong, or the decree was wrong—it is not wrong from any miscarriage in point of judgment on my part, but it rests entirely upon the orders made by the Court below. With regard to a decree, when it is not inrolled, I do not apprehend the *Lord Chancellor* signs it; it is merely drawn up, passed, and entered; but if it be inrolled, it becomes my order in point of form. So as to the injunction: on the writ issuing, it becomes my order in point of form; but as to any opinion on the merits, or as to any disadvantage which Mr. *Dimes* may be supposed to have sustained by the decision of the cause or the granting of the injunction, it does not rest on anything I have done, but on the orders of the *Vice-Chancellor* alone. And the utmost that Mr. *Dimes* can complain of is, that I have not, upon the appeal, varied the orders or the decree which the *Vice-Chancellor* has pronounced.

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That is all I propose to say on the matter, as it stands, except this: that if this be the law, and if that infirmity exists in this Court, some parliamentary enactment must necessarily take place, or otherwise there will be a total failure of justice; or the *Lord Chancellor*, when he accepts the Great Seal, must look about him and see what interests he has in any Company or any Association, and he must divest himself of every possible interest. I do not know how he is to do that, because he may be a holder of stock in the public funds—and most people who are honoured with the confidence of the Crown, from their circumstances are likely to be holders of stock. Suppose a question arises touching the revenue. Take the Barons of the Court of Exchequer, who are by the constitution of the jurisdiction to decide on matters of revenue. Suppose one of the Barons of the Court of Exchequer is a holder of Three per Cents., and a question comes before them touching the Consolidated Fund. Have they not precisely the same sort of interest that I have in the *Grand Junction Canal*? No doubt it is more minute—more remote—and it is not likely that any decision they will come to will affect their dividends. But it is not argued on the question of quantity or degree: it is on the abstract principle, that any interest in the result of the matter to be decided upon, is to incapacitate the Judge and to take away his jurisdiction. Now there is no matter that can affect the general revenue of the country, by which the Consolidated Fund is meant, which does not to a certain degree, or may not to a certain degree, affect that fund out of which the dividends are to be paid. It is an extreme case, I admit; but questions of principle are sometimes properly tried by extreme cases. However, I give no opinion upon that. Fortunately for me, it has been under the consideration of the *Master of the Rolls*, and the Bar have heard the opinion he has expressed.

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LASSENCE v. TIERNEY.

**MATTHEW** KANNEN by his will, after directing payment of his debts and funeral expenses, devised the residue of his estate and effects, real and personal, to his wife *Catherine Kannen, Joseph Lescher, and Sir Matthew John Tierney*, their heirs, executors, and administrators, to hold the same upon trust, to receive the rents, issues, interest, and dividends thereof, when and as the same should become due, and when the same should be so received, to pay and divide the same in manner following. The tes-

*Nov. 20th.  
Dec. 6th, 7th,  
10th, & 11th.*

By parol agreement before marriage, between the intended husband and wife, it was arranged that he should receive for his own absolute use a certain sum of money, part of the intended wife's property, and that the rest of

her property should be enjoyed by her, and settled to her sole and separate use. The intended husband duly received the money, but no settlement was made on the intended wife. After the marriage, the wife, by her next friend, filed her bill, stating the above facts, and praying a declaration that she was entitled to the property for her separate use, and that the same might be conveyed and transferred accordingly. The husband by his answer admitted the ante-nuptial arrangement. Subsequently to the filing of the bill, a deed was prepared, to which the husband and wife were parties, which was recited to have been made in pursuance of the ante-nuptial arrangement, and by which the husband assigned and conveyed to a trustee all his right and interest in the wife's property for her sole and separate use, and empowering her to dispose thereof by deed or will, as if she had not been a married woman. The deed was not acknowledged by the wife pursuant to the provisions of the Statute. She afterwards died, having previously made a will, whereby she gave the property to her husband and other parties. The husband and trustee then filed their bill of revivor and supplement against the heir-at-law of the deceased wife, and other parties, stating the above facts, and praying that the ante-nuptial arrangement might be decreed to be carried into effect, and that the heir-at-law might be decreed to convey all his estate and interest in her real estate, in conformity with the will, and (if necessary) that the want of an acknowledgment of the deed might be supplied by the Court, and that the will might be declared a good execution of the power given to the wife by the deed.

*Held*, first, that, under the circumstances stated, there was no case proved against the heir-at-law; secondly, that a parol agreement entered into before marriage, and nothing following thereon except the marriage, could not, on the true construction of the Statute of Frauds, be carried into effect by the Court; and, thirdly, that the want of an acknowledgment of a deed would not be supplied by the Court, inasmuch as such a proceeding would destroy the guard which the law threw around married women for their protection, against the influence of their husbands.

If a testator leave a legacy absolutely, as regards his estate, but restrains the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee, on failure of such objects, the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having, in such event, been given away from it.

The intention of the testator, that the gift should be absolute as between the legatee and the estate, is, in all cases of construction, to be collected from the terms of the will, and not from an expression or words which, standing alone, would constitute an absolute gift.

Where the first expressions in a will are ambiguous and capable of two constructions, the other parts of the will, dealing with the whole property under any circumstances which might arise, are very important for consideration, in aid of the construction to be put on those expressions, and determining the intention of the testator.

The rule of the Court as to the costs of an appeal is, that when the case has been once decided and the decision is quarrelled with, but found correct on appeal, the dissatisfied party must pay the costs of the appeal.

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tator then gave divers annuities, and legacies to a number of persons, and afterwards expressed himself as follows: viz. "I give and bequeath to my only daughter, *Catherine Read*, wife of *Joseph Read*, of *Tottenham Court-road*, in the county of *Middlesex*, stock-broker, the residue and remainder of my property, wheresoever and whatsoever, to receive the interest thereof during her lifetime, both in funds, houses, and the interest of money arising from any other source, and without being subject to any control or restraint from her present or any future husband, solely for her own use and purpose, her receipt alone to be taken as legal for the money she receives. It is also my will, that she shall not have any power to dispose of any part of my property during her life, unless for the purpose of transferring it from one stock to another, or of disposing or selling any houses or money in the funds for the sole purpose of investing it in some other concern or purchase which may be deemed more eligible than where it was already placed; but this must be done with the entire consent of the executors and executrix. It is also my will, that the whole property shall be divided between her children after her decease, share and share alike, in the following manner, viz. that the males shall have one half of the property bequeathed to them when they arrive at the age of twenty-three years, and to receive the interest of the other or remaining half of their shares during life, and to equally divide it among their children after their decease, or to the next relation or to their husbands as long as they live, if they should have no issue. I also wish the property or share coming to the females to remain invested where it was placed, if secure, or, if not deemed so, to be placed in any other way the executors may deem proper, without incurring risk of its being lost or misplaced, and to receive the interest only during their lives, without being subject to any restraint or control from their husbands; and if it can be proved that they shall ever attempt to

dispose or sell their life-interest in it, it is my will that the property go over to their brothers, and that they shall be entirely deprived of it. After their decease their part of the property to be divided, share and share alike, between their children, and, if they have no issue, among their husbands during their lifetime, then go to the nearest relation on their mother's side."

The testator appointed the said Sir *Matthew John Tierney* and *Joseph Lescher*, in conjunction with his wife, his executors.

The testator died in the year 1823, leaving his widow and *Catherine Read* and *Joseph Read* her husband surviving him. *Read* and his wife had four children only, one of whom died in the testator's lifetime, and the other three died in the years 1825, 1832, and 1833 respectively, all infants, and without having been married. The testator's widow died in the year 1833, and *Joseph Read* shortly predeceased her. In the following year, 1834, *Catherine Read* intermarried with *John Gregory Lassence*, but there was no issue of that marriage. In the month of January, 1842, *Catherine Lassence* by her next friend filed her bill against the testator's executors and her husband, as Defendants, stating (amongst other things) the fact of letters of administration having been granted to her to the effects of the three deceased children who survived the testator; her intermarriage with the Defendant *J. G. Lassence*; that there had been no issue of that marriage; that, previously to that marriage, it had been agreed between the Plaintiff and *J. G. Lassence*, that a sum of 3000*l.*, part of her property, should be invested in the purchase of a Government annuity for his life, for his own benefit; that she should enjoy the residue of her property, whether derived from the testator or otherwise, for her sole and separate use; and that a proper settlement thereof should be executed by them, if neces-

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sary; that the sum of 3000*l.* was laid out pursuant to the agreement, and the annuity duly received by *J. G. Lassence* ever since the marriage, but no settlement had ever been made of the other part of the property upon *Catherine Lassence*, who had then attained her fiftieth year, and was not likely to have any other child; and that, under the circumstances, she was entitled to have the corpus of the testator's personal estate transferred to her; and praying a declaration, that, in the events which had happened, the Plaintiff was entitled absolutely, either by representation or otherwise, to the testator's residuary estate for her separate use; and that the same might be conveyed and transferred accordingly; and that the *Bank of England* might be restrained from permitting a transfer of any stocks standing in the names of the trustees, to any person except the *Accountant-General*. The several Defendants filed their answers to the bill, the Defendant *J. G. Lassence* by his answer admitting the ante-nuptial agreement; and on the 7th of March, 1843, the *Master of the Rolls (inter alia)* ordered a reference to the Master to inquire as to the children of *Catherine Lassence*, and who were their nearest relations, exclusive of the Plaintiff, at their deaths, and who were the next of kin of the testator living at the time of his death, and who was at his death and at the date of the order his heir-at-law; and large sums of stock were at the same time ordered to be transferred by the executors into Court, to the account of the testator's personal estate. It was also ordered, that the executors should transfer into Court to an account to be entitled "The Account of the Produce of the Testator's Real Estate," 420*l.* 15*s.* 2*d.* Bank 3*l.* per cent. Annuities.

By an indenture of settlement dated the 21st of October, 1843, made between *J. G. Lassence*, of the first part, *James Fawcett*, of the second part, and *Catherine Lassence*, of the third part, and executed by the same parties; and alleged

to have been made in pursuance of an agreement entered into previously to the intermarriage of *J. G. Lassence* and *Catherine Lassence*, *J. G. Lassence* assigned to *James Fawcett* all his right and interest whatsoever in the real and personal estate of the testator and *Joseph Read*, deceased, upon trust for him to pay, or permit *Catherine Lassence* to receive, the rents, issues, and profits thereof for her sole and separate use during her life, and upon her decease to pay, transfer, and assign the trust property unto such persons as she should by any instrument under her hand and seal, attested by two or more credible witnesses, or by her last will, appoint, and, in default of such appointment, unto such persons as should be entitled thereto, in case *Catherine Lassence* had not intermarried with *J. G. Lassence*, according to the Statute of Distributions. That indenture was not acknowledged in compliance with the provisions of the Act passed for the abolition of Fines and Recoveries, viz. the Act 3 & 4 Will. IV, c. 74. *Catherine Lassence* died on the 14th of May, 1847, without having had any issue by *J. G. Lassence*, leaving the Defendant *Matthew Kannen*, of *Aughencuirk*, her heir-at-law, her surviving, and having previously made her will, dated the 12th of May, 1847, pursuant to the authority given her by the indenture of the 21st of October, 1843, whereby, after making certain specific and pecuniary bequests, she gave the residue of her property, and of that over which she had any disposing power, unto *J. G. Lassence* and *James Fawcett* (whom she also appointed her executors), in trust, as to one-third part thereof, for *J. G. Lassence*, another one-third part for *Septimus Read*, and the remaining one-third part for *Reginald Read*. On the 20th of July, 1847, *J. G. Lassence* and *James Fawcett* (since deceased) filed their bill of revivor and supplement against *J. Lescher*, the surviving trustee and executor of the testator, *Matthew Kannen* the heir-at-law of *Catherine Lassence*, *Ann Tucker* and *George W. Fitzgerald*, the personal representatives of *Catherine Kannen*, and *Septimus Read*

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and *Reginald Read*, whereby, after stating to the effect before mentioned, and that the Plaintiffs had procured letters of administration to the three before-mentioned deceased children of *Catherine Read*, prayed a revival of the suit originally instituted (which was shortly afterwards ordered); and that, under the circumstances mentioned, the agreement entered into previously to the marriage between *J. G. Lassence* and *Catherine Lassence* might be decreed to be carried into effect so far as the same remained unperformed, and, for that purpose, that the Defendant *Matthew Kannen*, as the heir-at-law of *Catherine Lassence*, might be decreed to convey all his estate and interest in her real estate to her aforesaid appointees; and that, (if need be,) the want of an acknowledgment of the indenture of the 21st of October, 1843, by *Catherine Lassence*, might be supplied by the Court, in favour of the said appointees; and, if necessary for that purpose, that the will of *Catherine Lassence* might be established and declared to be a good execution of the power given to her by the settlement of the 21st of October, 1843; and that a receiver might be appointed over the property.

On the 26th of March, 1849, the Master made his general report, finding, amongst other things, various classes of relations of the testator and his family, which report was duly confirmed; and on the 8th of June, 1849, the original and revived and supplemental causes came on to be heard before Vice-Chancellor *Wigram*, on further directions, when it was declared by his Honor, that, according to the true construction of the will of the testator *Matthew Kannen*, and in the events which had happened, the real and personal estate of the testator, after the life-interest given to *Catherine Lassence*, was undisposed of as in the case of an intestacy; and that the interest which *Catherine Lassence*, as sole heiress of the testator, took in his real estate, did not pass by his will, and had descended

upon her heir-at-law, the Defendant *Matthew Kannen*; and it was further declared, that the sum of 420*l.* 15*s.* 2*d.* Bank 3*l.* per Cent. Annuities, in which the monies arising from the sale of part of the testator's real estate to the *Blackwall* Railway Company had been invested, was to be considered as real estate. The consequential directions were accordingly given by his Honor for the transfer of that sum of stock, and payment of a sum of 30*l.* 12*s.* 11*d.* cash, standing to the credit of the cause to the like account, and also for the transfer of the other sums of stock standing to "the account of the testator's personal estate," in accordance with the former part of the decree.

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The Defendants *S. Read* and *R. Read* appealed against that decision, and on the petition of appeal coming on to be heard, a difficulty was started as to its form, which was afterwards obviated by making it the appeal of *J. G. Lassence*.

The grounds of objection stated in the petition of appeal to the decree were, that the whole of the personal estate bequeathed by the testator's will, subject to the life estate of *Catherine Lassence*, became absolutely vested in equal shares in such of the children of *Catherine Lassence* as survived the testator, and that, by the death of all such children intestate and unmarried, and in the lifetime of her first husband, and by the will of her first husband, *Catherine Lassence* became absolutely entitled to the whole of such personal estate; and that, by the testamentary appointment or disposition made thereof by *Catherine Lassence*, *J. G. Lassence*, *S. Read*, and *R. Read* became entitled to the whole of such personal estate in equal shares; that, assuming the real estate of the testator to have descended, as in the case of intestacy, upon *Catherine Lassence* as his heir-at-law, still, having regard to the indenture of the 21st of October, 1843, and to the ante-nuptial agreement, and to the answer filed by *J. G. Lassence* admitting the same, such real

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estate was subject in equity to the testamentary appointment or disposition thereof made by *Catherine Lassence*, in exercise of the power reserved by the indenture of the 21st of October, 1843, notwithstanding that the same indenture was never duly acknowledged by her in the manner required by the Act 3 & 4 Will. IV, c. 74; and that the heir-at-law of *Catherine Lassence* ought to be declared to be a trustee of such real estate for the parties entitled thereto under her said will: and further, that the two several sums of 420*l.* 15*s.* 2*d.* Bank 3*l.* per Cent. Annuities, and 30*l.* 12*s.* 11*d.* cash, standing as aforesaid, ought to be regarded as personal estate; or, even if the same ought to be considered as part of the testator's real estate, still, those sums were subject to the trusts of the testamentary appointment made by *Catherine Lassence* in favour of *J. G. Lassence*, and *S. Read*, and *R. Read*.

Argument.

Mr. *Rolt* and Mr. *F. S. Williams*, in support of the appeal, contended that the words used by the testator were sufficiently extensive to comprise both the real and personal estate; that the whole fee simple in the real estate, and absolute interest in the personal estate, vested in the testator's daughter; or, if the Court should not be of that opinion, still there was a gift of a life-interest to her, coupled with an absolute vested interest to her three children. That the principal object of the testator was to exclude any interference on the part of the husband with the disposition of his property; that the observations of Vice-Chancellor *Wigram* on the second point, in *Leeming v. Sherratt* (a), were applicable to the present case. The other cases cited in support of the appeal, as to the construction of the will, were *Whittell v. Dudin* (b), *Arnold v. Congreve* (c), *Hulme v. Hulme* (d), *Ring v. Hardwick* (e),

(a) 2 Hare, 14.

(b) 2 J. & W. 279.

(c) 1 Russ. & My. 209.

(d) 9 Sim. 644.

(e) 2 Beav. 352.

*Winckworth v. Winckworth* (a), *Saunders v. Vautier* (b), *Mayer v. Townsend* (c), *Campbell v. Brownrigg* (d), *Carver v. Bowles* (e), and *Kampf v. Jones* (f). As regarded the sale of part of the testator's real estate to the *Blackwall Railway Company*, the case of *Ex parte Hawkins* (g) was cited as an authority in favour of its conversion, and it was contended, that *Catherine Lassence*, in whom the legal interest was vested, had authority to sell the same. As to the effect of the ante-nuptial agreement and proceedings relative thereto, it was insisted that inducements held out by a wife before marriage would be carried into effect by the Court, and that the husband in the present case, having been benefited, and given an unqualified consent to be bound by the agreement, the Court would not withhold its assistance, but decree the heir-at-law to carry the deed of settlement into full effect: *Baron de Biel v. Thomson* (h), *Hammersley v. Baron de Biel* (i), *Codrington v. Earl of Shelburne* (k), and *Steinmetz v. Halthin* (l).

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 Argument.

The *Solicitor-General* and Mr. W. M. James, for the Defendant, the heir-at-law of *Catherine Lassence*, contended, with reference to the testator's real estate, that the Court would not supply the want of the acknowledgment of the deed of settlement against the heir-at-law; but, even were the Court inclined to do so, still, in the present case, on reference to the deed it would be seen that it did not affect the wife's interest in the testator's real estate, but only the husband's interest therein, whatever that might be; that, as to the sale of part of the real estate to the *Blackwall Railway Company*, it was not alleged to be

(a) 8 Beav. 576.

(b) Cr. & Ph. 240.

(c) 3 Beav. 443.

(d) 1 Ph. 301.

(e) 2 Russ. & My. 301.

(f) 2 Keen, 756.

(g) 13 Sim. 569.

(h) 3 Beav. 469.

(i) 12 C. & F. 45.

(k) 2 Dick. 475.

(l) 1 G. & J. 64.

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a sale by the wife, and could not be considered a *conversion*, inasmuch as it was effected under the compulsory clause contained in the Act establishing that Company, which did not change the nature of the property taken by it; that the power of sale, moreover, given by the will to *Catherine Lassence*, was to be exercised for the sole purpose of investing the produce in some purchase which might be deemed more eligible than the property which might be sold; that such sale must be with the entire consent of all the executors; and that, in *Ex parte Hawkins*, the only decision of the *Vice-Chancellor* was, that the owner in fee of the property had actually sold it.

Mr. *James Parker* and Mr. *John Baily*, for the personal representatives of the testator's widow, contended that all the cases cited in support of the appeal were, in their circumstances, infinitely stronger than anything that could be found in the present case; that, in *Carver v. Bowles*, the power was to appoint to children only, and the will there in no manner disputed the interest of the daughter, in case she had no child; that, in the present case, there was nothing like an immediate vested interest given to the children of *Catherine Lassence*, but, on the contrary, as regarded the male children, the attainment of twenty-three years of age was clearly annexed to the gift, and was void for remoteness; and that the doctrine laid down by the *Master of the Rolls*, in *Scawin v. Watson* (a), must govern the present case, the gift here being a limited one followed by a subsequent restricted gift, and the gift, therefore, not enlarged by the failure of the subsequent gift.

Mr. *Goldfinch*, for the surviving trustee, stated, that, on his behalf, he must require the directions and aid of the Court, in case any order should be made for the sale of the testator's leasehold estates.

(a) 10 Beav. 200.

Mr. *Rolt* was heard in reply.

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Dec. 10th.

Judgment.

The LORD CHANCELLOR:—

There is no doubt as to the rule upon which the principal question in the case, the title to the personalty, must be decided. In this and the many similar cases which have occurred, the only question is, the application of the rule to the facts. If a testator leaves a legacy absolutely as regards his estate, but restrains the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee, on failure of such objects, the absolute gift prevails; but if there is no absolute gift as between the legatee and the estate, but particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having, in such event, been given away from it. In the latter case, the gift is only to particular purposes; in the former, the purpose is the benefit of the legatee as to the whole amount, and the directions and restrictions are to be considered as applicable to a sum no longer part of the testator's estate, but already the property of the legatee. In every case, therefore, the question must be one of construction, and, except for the purpose of such construction, very little assistance can be derived from former decisions. It is, however, obvious that the intention that the gift should be absolute as between the legatee and the estate, is, as in all cases of construction, to be collected from the terms of the will, and not from there being words used which, standing alone, would constitute an absolute gift. In *Scauin v. Watson* (a), there were words of absolute gift of the 1000*l.*, but the *Master of the Rolls* considered the whole direction to amount to a gift of the 1000*l.* for the benefit of the daughter, to pay her the interest for life, with remainder to her children; and,

(a) 10 Beav. 200.

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upon an appeal, I concurred in that opinion, and affirmed his Lordship's order. In *Gompertz v. Gompertz* (a), there were words which, standing alone, would have amounted to an absolute gift, but special provisions followed, which failing, the *Vice-Chancellor of England* held the fund to be undisposed of; and, on appeal, I affirmed that decision, and stated, that, in the cases cited, there was a gift, and then a direction as to the manner in which the legacy was to be applied to the benefit of the legatee, and not in qualification or diminution of the original gift, but merely a direction as to the mode in which it was to be dealt with and enjoyed in certain cases.

Upon again examining the earlier cases, I adhere to this description of the rule. In *Campbell v. Brownrigg* (b), there was a direct gift of 50,000 sicca rupees, to be employed for the use of the legatee in a particular manner. That manner of employment having failed, Lord *Lyndhurst*, reversing the decision of the Court below, held that the legatee's title was absolute, saying, to the extent prescribed, the use was controlled, but no further. The other cases cited on the part of the Appellant, *Winckworth v. Winckworth* (c), *Hulme v. Hulme* (d), *Mayer v. Townsend* (e), and *Whittell v. Dudin* (f), (in which case Sir *Thomas Plumer* very clearly expounded the rule,) proceeded on the same distinction. *Carver v. Bowles* (g) and *Kampf v. Jones* (h) were cases of the execution of powers in which there were absolute appointments within the power, and attempts to modify the enjoyment beyond the power; and it was held that the appointments were to be considered absolute ones.

Looking, then, at this will, for the purpose of considering

(a) 2 Ph. 107.  
 (b) 1 Id. 301.  
 (c) 8 Beav. 576.  
 (d) 9 Sim. 644.

(e) 3 Beav. 443.  
 (f) 2 J. & W. 279.  
 (g) 2 Russ. & My. 301.  
 (h) 2 Keen, 756.

whether the testator intended an absolute gift, with directions as to the mode in which the property so given was to be enjoyed by the legatee, or intended that the gift only should take effect in the several cases and for the several purposes specified, it appears to me sufficiently clear that the latter was his intention; the will itself, although very inaccurately worded, and therefore creating a difficulty in ascertaining with very great certainty what in particular passages was the real intention of the testator, when examined with that view, leaves no doubt of what his intention was. In the first place, he names his wife and two other persons executors and trustees: he appoints them executors, and then gives the property to them; there were certain specific purposes to be answered, annuities and debts to be paid, and other directions to be followed; then he proceeds to give away the residue, and, having appointed three persons executors, and those same three persons trustees, for the earlier purposes of his will, he deals with that residue in these terms: "I give and bequeath to my only daughter, *Catherine Read*, wife of *Joseph Read*, the residue and remainder of my property, wheresoever and whatsoever." Now, on the part of the Appellant it is desired that it should be read as if this was an end of that gift. No doubt that would be an absolute gift, capable of being controlled, perhaps, by other parts of the will; but it would be in terms an absolute gift, because it appears to me quite clear that it is not a gift of the beneficial interest in the property,—it is a gift to her for certain purposes which are afterwards prescribed. If there were any doubt about that, the words that follow, "to receive," put an end to that doubt; but it is further proved by the provision in the will, which enables her to transfer or dispose of the principal of the funds, which she may do, but only for the purpose of changing the same from one security to another; and then, in the exercise of that discretion, she is to call in aid the opinion of the other executors. It is a gift to her,

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—  
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therefore, of the residue; but it is a gift of the residue in trust, and the trusts are afterwards declared. Now, for what purpose is the gift? If the words, instead of being "to receive," had been "in trust," of course there could have been no question raised at all; and the first point that arises is, whether it is not sufficiently evident on the face of the will that it is given to her, the primary object being answered of payment of debts and legacies, in trust to carry the further purposes of the will into effect. The testator gave it to her "to receive the interest thereof during her lifetime." If the words had been "in trust to retain the interest during her lifetime," there would have been an end of the question. However, she is "to receive the interest thereof during her lifetime, both in funds and houses, and the interest of money arising from any other source, and without being subject to any control or restraint." Then come those provisions which were obviously intended to protect her against marital authority, in the event of her taking a husband. In the next place, there is the prohibition against selling; and then, having given her in that way an estate for life, or rather a direction to her to whom the whole property has been given, to retain the interest for life, the testator says, "It is also my will that the whole property shall be divided between her children after her decease, share and share alike." There again, the Appellant would stop, and say here is a positive gift to the children; but in that case you are resting in the middle of a sentence, and you cannot, in ascertaining the intention of the testator, strike out words which are so immediately connected with the gift as to shew exactly what he meant. The property is to be divided among the children in manner following; that is to say, sons, when they attain twenty-three. Now, that must undoubtedly be taken as one direction, because "in manner following" is the same as if the manner had been incorporated in the gift; and if that had been incorporated in the gift,

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 Judgment.

it would be a gift to the children of the tenant for life, when they shall attain twenty-three years of age; that is to say, it is the case of *Leake v. Robinson* (a). It is to a class of persons, some of whom may be born after the testator's own death, and are not to have the benefit of the gift till they are twenty-three, and then, and not till then; and amongst such children, and not other children, it is then to be divided. A gift to divide property among unborn children at twenty-three years of age, is a gift void for remoteness. Consequently, it appears to me quite plain that the moiety bequeathed to the sons falls within the same rule; it is the same as if none of them attained twenty-three; it is therefore undisposed of, and goes with the residue of the property.

Then it is not in dispute that as to the rest the gift is void, because they are not only children's children, but children born not only after the death of the tenant for life, but after the death of the tenant for life not in being. That is matter in common between all the parties. It is not in contest that all the subsequent gifts are void for remoteness.

Then comes the most important part of this will, as it appears to me, viz. the question whether it is an absolute gift, or whether it is only a direction to her to whom the property was given to retain the income for her life. Now, the testator contemplates children of his daughter, and contemplates children of those children, and then he provides for those events. He next proceeds to provide for the only other event which could happen, namely, there not being children, and he proceeds as follows:—"And if they have no issue, then to go to the nearest relation on their mother's side." Has not the testator

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in those terms disposed of all the beneficial interest after the life estate to the daughter? He says, I give to the daughter for life, and then I give to her children. He then endeavours to provide for her children's children, and if there are no children (which is the only other alternative that could happen), then he gives it to somebody else. Now, how is that consistent with the intention that there should, in any event, be an absolute gift in the daughter, and merely a mode of enjoyment prescribed by providing for herself and her family? If the testator has given everything away in every possible event, he could not have an intention that anything should remain for the party the object of his gift. During the argument, I asked if there was any case in which that had occurred. It can only be material when the first expressions are ambiguous, for if there is a distinct positive gift, and the intention is expressed, of course nothing that afterwards follows can affect the construction of the positive gift. It would be an extraordinary case indeed if it could: but where the first gift is capable of two constructions, you have to look at other parts of the will to see what the testator's intention was; and no doubt the dealing with the whole property under any circumstances that could arise, is an important consideration in putting a construction on ambiguous expressions. I have looked at every case referred to, and I have endeavoured to find others, but I have met with no case in which that question has arisen, where there has been an attempt to give away the whole interest in every possible event that the testator contemplated, nor does it seem possible that these two intentions could exist together. If they are both found in the same will, the Court may have to decide which is to prevail, but if the first is ambiguous and the other is not, the unambiguous expression must have great effect in controlling that which is ambiguous, in order, if possible, to make every part of the will coincide, and that there may not be a violation of any

provisions in any part of it. No case like that has arisen excepting one, which is not directly applicable to the present case: I refer to *Kampf v. Jones* (a), already mentioned by me. There was in that case a gift to the next of kin of the legatee, but that was not a gift under the will: it was an execution of a power; and the Court held, that the gift to the first taker was within the power, and therefore good, but that the attempt to regulate and control the future enjoyment of the property was beyond the power, and therefore bad; and the Court held, therefore, that the appointment, when good for the benefit of the first taker, could not be controlled by that which followed, which was beyond the reach of the power. It is quite true that there, as here, the Court had to look to what was the intention, because, if it appeared, that, having regard to the whole of the will, there was an intention to appoint absolutely to the first taker, undoubtedly it would operate on the question before the Court. It seems the opinion of the Court was very much regulated by the fact, that this was an execution of a power, and that that part of the will which ineffectually attempted to execute the power, being beyond the power, could not control an absolute and antecedent gift in the early part of the will. But the argument there, which seemed to operate on the mind of the Court was, that there was an absolute, positive, and undoubted exercise of the power, so as to amount to an appointment in the first instance; therefore the subsequent part of the will, if inconsistent therewith, could not be considered as controlling an unquestionable gift. So, if there had been in this case an unquestionable gift in the early part of the will, I should have attached some weight to it. But it is because the first part of the will is doubtful and ambiguous, and capable of a different construction, that we are to look at other parts of the will to see what

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(a) 2 Keen, 756.

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construction is most consistent with the apparent intention of the testator. Now, looking at this will, and without at all infringing on any one of the cases that have occurred, it appears to me there is not in this case that absolute positive gift in the first instance, which would bring it within the principle of any of the decided cases. I think, on the contrary, the whole provision taken together is sufficient to shew there was no intention that the original legatee should take the absolute interest, subject to any control, for her own benefit, as to the mode of enjoyment, but that the intention was that she should have an estate for life, and for life only, and a provision for her family, which, from the mode in which it is to be carried into effect, becomes inoperative in law, and that, consequently, on her death the property becomes undisposed of, and forms part of the testator's residue.

Now, as to the other point, viz. the railway purchase, I do not see that there is any case made. It depends on the Railway Act; and that provides, that if property shall be taken, the purchase-money shall be laid out upon other property, which is to be settled in the same way; in short, that it shall preserve the character of land for the benefit of all parties entitled; and there is nothing on that part of the case that affects the money produced by the sale of land to the Railway Company.

[His Lordship here proceeded to the remaining question, viz. how far the will of *Catherine Lassence* was binding in favour of her devisees against her heir-at-law, when a discussion of considerable length arose between his Lordship and Mr. *Rolt*, which ended in his Lordship stating that he would look at the pleadings in the original and supplemental suits, and state his opinion on the question the following day, the 11th of December, and which was as follows:—]

The LORD CHANCELLOR:—

I have looked at these two bills, and it appears to me, that there is no case either alleged or proved against the heir. There is merely an allegation in a bill filed by a married woman, and the husband answers and admits the allegation, and then, upon her death, he files a bill resting his case (for there is nothing else to rest it on as matter of evidence) upon what had been alleged in the bill filed by the wife. It is quite clear, therefore, that there is not only no evidence, but no appearance of there being any possible means of proving the fact. The cause being then brought on for hearing, in that state of evidence, it is quite obvious there could be only one result of the proceeding, viz. that the bill must have been dismissed for want of proof. That, probably, would be as far as it would become me to go; but, though it does not come before me for judgment, on the suggestion of the Plaintiff, I will state in what way it stands in point of right and proof.

A bill is here filed by a married woman, alleging a parol agreement before marriage and a subsequent marriage,—a contract solely and entirely for her benefit; nothing whatever is given up to the husband, nor is anything contracted to be done by him, but he is to take 3000*l.*, which he does take, and, taking that sum, he contracts that the wife shall enjoy the rest of her property. Nothing follows on that; the marriage takes effect, and a deed is prepared, to which the wife's name is attached, but which is quite immaterial, as she was incapable of binding herself in that way; a document, indeed, is prepared, which never was acknowledged by her, and never received, therefore, that ceremony which by law is necessary to bind her interest; and under these circumstances she dies, and then her husband files a bill, and the equity, of course, which he thereby asserts is, that he and his wife contracted before their marriage, that there should be, if necessary, a settle-

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 ———  
*Judgment.*

ment, ("if necessary," of course, means necessary for the purpose of the contract which was to secure her in the enjoyment of her separate estate). He then states that nothing transpired after that to bind the wife; but that, if a settlement had been prepared in the way in which it ought to have been, there would have been a provision contained in it, reserving to the wife power to give away the property by will; that she made a will, whereby he, the husband, was to be benefited to a certain extent; and that he, as her devisee, claimed as against her heir to have the will carried into effect.

In the first place, suppose the wife to have been living, could any one assert any equity against her? The whole is for her benefit; there is nothing against her but a parol contract before marriage, and there is nothing but marriage ensuing, which will not support the contract; and such a contract cannot be carried into effect under the Statute of Frauds. Now, the case of *Hammersley v. Baron de Biel* (a) was referred to in support of the husband's equity, but it is, unfortunately, only stated in a note to the report of the case when it came before the House of Lords. It is not reported before this Court at all. I was very glad to find, that, in delivering judgment in that case, I guarded myself, as I supposed, against such a use being made of the case; because I there observed, that a parol contract followed only by marriage is not to be carried into effect, marriage being no part performance of the contract. If it were, there would be an end of the Statute of Frauds, which enacts that a contract in consideration of marriage shall not be binding, unless it be in writing. If marriage be part performance, every parol contract followed by marriage would be binding. That is no new doctrine; it is what Lord *Eldon* says in *Dundas v. Dutens* (b), and has

(a) 12 C. & F. 45.

(b) 1 Ves. jun. 196.

always been considered and recognised as law. In *Hammersley v. Baron de Biel*, I stated that that case was to be thus distinguished, viz. by the husband, on his part, having contracted to do something which he had actually done, and, having done that, there was a part performance of the contract which had relation to property to which he was entitled. In that case there was a contract before marriage, and the question turned, first upon this, viz. whether, there being a contract, the parties entering into the contract were the parties authorised to do so; and I was of opinion that they were. The case of *Hammersley v. Baron de Biel*, therefore, not only does not sanction the doctrine on which alone this bill is attempted to be supported, but the reason given for the judgment proves directly the reverse.

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 Judgment.

Supposing, however, the objection I have adverted to not to be good, could any one enforce the agreement against the wife? The wife enters into a parol agreement, which is not binding at all, and she does nothing in the course of her life which would make it binding. She affixes her name to a deed which is inoperative, and she does not (but for what reason does not appear) do that which the law considers alone sufficient to bind her interest in the land. First of all, the bill prayed that this might be made good, by supplying the want of acknowledgment. The making it good would entirely destroy the guard that the law throws round married women for their protection. Why does the law say a married woman shall not be bound, unless certain ceremonies take place? Because it presumes she is under the influence of her husband. If the mere execution of a deed is to supply the defect, the moment you establish such a rule, the guard which the law throws round a married woman is destroyed, and I am quite clear that such a doctrine would be productive of the greatest possible evil. This, therefore, is the case of a



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—  
*Judgment.*

married woman, who has never done anything in her lifetime to bind herself, and dies under these circumstances; and then there is a bill filed by those who claim under her will, which she had no authority to make, praying the Court to consider the case, just as if there had been a settlement executed and a power reserved to her, which the law permits, of dealing with her property independently of those guards which the law throws around a married woman when she is dealing with property actually vested in her.

Under these circumstances, I am clear, that, even if the facts alleged were proved, the objection to the contract would equally have prevailed. In point of fact, there are three grounds, each of which is sufficient to dispose of the case as between the devisee and the heir.

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A discussion having arisen as to the costs of the appeal, his Lordship stated, that his rule was, that, when the case had been once decided, and the decision was quarrelled with, but found to be correct, the parties complaining must pay the costs of the contest. The appeal was accordingly dismissed, with costs.

1849.

*In re* JONATHAN SANDFORD, a Lunatic.

*Dec. 7th & 22nd.*

UNDER an order of the *Lord Chancellor*, of the 8th of June, 1846, one of the Masters in Lunacy personally examined *Jonathan Sandford*, and, on the 11th of July, 1846, certified that he was a lunatic. By an order of the *Lord Chancellor*, dated the 30th of July 1846, *Humphrey Sandford* and *Elizabeth Sandford* were appointed guardians of the person of the lunatic, and *H. Sandford* was appointed the receiver of the lunatic's estates.

*Scmble*, the order of the *Lord Chancellor*, under the 6th section of the Stat. 1 Will. IV, c. 60, confers no title on a purchaser of mortgaged hereditaments under a power of sale, where the purchase-money exceeds 700*l.*, although the total amount due and payable beneficially to the estate of the lunatic (not found so by inquisition) is less than that sum; but the *Lord Chancellor*, on the petition of the receiver of the lunatic's estate, (the purchaser consenting to take the title) directed a reference to the Master, to inquire whether the lunatic was a mortgagee, what sum was due on the mortgage, whether the sale that had been made was a proper one, and what sum would be coming to the lunatic mortgagee on its completion.

In August, 1842, and previously to the lunacy, *J. Sandford* advanced to *C. E. Thompson* a sum of 1200*l.*, by way of mortgage on certain freehold property situate in *Kent*; and in the deed securing the repayment thereof and interest, was contained a power for *J. Sandford* to sell the premises, in case of default of payment, on a particular day, of the principal and interest monies. The mortgage and title deeds were afterwards deposited by *J. Sandford* with other parties, as a security for monies owing to them from the lunatic. *E. Sandford*, on the application of the Petitioner, as the receiver of the lunatic's estate, consented to pay the sums due from the lunatic to the equitable mortgagees, amounting in the whole to 500*l.*; and the mortgage and title deeds were handed over to her on payment of that sum.

In consequence of the lunacy of *J. Sandford*, (the jurisdiction of the *Lord Chancellor* being limited by the Act 8 & 9 Vict. c. 100, under which the lunacy was found) the power of sale given to him could not be exercised; and in the month of February, 1848, *C. E. Thompson*, the original mortgagor, by deed conveyed the mortgaged premises to the Petitioner, in trust to sell, and, after payment of the costs of the sale, out of the purchase-money to satisfy the amount due to *E. Sandford*; and, in the next place, to retain to him-

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 {  
*In re*  
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 ———  
*Statement.*

self, as the receiver of the lunatic's estates, the amount and costs remaining due under the securities made to the lunatic, and, after such payment and retention, to pay the residue (if any) to *C. E. Thompson*. The mortgaged premises were accordingly sold, and realised the sum of 900*l.* only; so that, after payment of the 500*l.* due to *E. Sandford*, there would be only 400*l.* coming to the lunatic's estate in part satisfaction of a much larger sum due thereto. The petition, as originally presented by *H. Sandford*, after stating the above facts, verified by affidavit, prayed, that, on payment to the Petitioner of the sum, not exceeding 700*l.*, which should remain after payment of the amount due to *E. Sandford*, the Petitioner might be directed, in the place of the lunatic, to convey the mortgaged hereditaments to the purchaser.

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*Argument.*

*Mr. James Parker* and *Mr. Renshaw*, for the Petitioner, relied on the 5th section of the Stat. 1 Will IV, c. 60 (a), as an authority for the order sought.

(a) "And be it further enacted, that where any such person as aforesaid, being lunatic, shall not have been found such by inquisition, it shall be lawful for the *Lord Chancellor*, intrusted as aforesaid, to direct any person whom the said *Lord Chancellor* may think proper to appoint for that purpose, in the place of such last-mentioned lunatic, to convey or join in conveying such land, or to transfer or join in transferring such stock, and receive and pay over the dividends thereof, as hereinbefore is mentioned; and every such conveyance, transfer, receipt, or payment shall be as effectual as if the said person, being lunatic, had

been of sane mind, memory, and understanding, and had made, done, or executed the same; but where any sum of money shall be payable to such lunatic, no such last-mentioned order shall be made if such sum of money shall exceed 700*l.*; and where any sum not exceeding 700*l.* shall be payable to such lunatic, and any such order shall be made, the *Lord Chancellor*, intrusted as aforesaid, shall direct to whom and in what manner the money so payable shall be paid; and every payment made in pursuance of such direction shall effectually discharge the person paying the same, from the money which he shall so pay."

Mr. *Birkbeck* appeared for the purchaser, and expressed his assent to take the title.

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The mortgagor did not appear on the petition.

The LORD CHANCELLOR, after perusing the 3rd and 5th sections of the Act, and expressing a doubt as to his jurisdiction, under the circumstances of the case, to make the order, observed, that it was his duty to take care not to give the purchaser a bad title. If, however, the purchaser, knowing the difficulty, elected to take the title, that was another thing, but he (the *Lord Chancellor*) gave him no title.

*Judgment.*

His Lordship then directed the petition to stand over until a future day, when, if the purchaser should signify his willingness to take the title, he would make the order.

Liberty was also given to amend the title of the petition.

On the petition being called on this day, Mr. *J. Parker* said, that he asked an order for a reference to the Master, to inquire whether the lunatic was a mortgagee, what sum was due on the mortgage, and whether the sale which had been made was a proper one, and what would be coming to the lunatic mortgagee on its completion; the report on which inquiries would bring out the facts for the *Lord Chancellor's* consideration; and an order was made accordingly.

*Dec. 22nd.*

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Nov. 8th, 9th,  
& 10th.

Where the sale of property takes place under a power contained in an annuity deed, the annuitant is a trustee for the purpose of the sale, and neither he nor his attorney or agent is qualified to become the purchaser.

An annuitant with a power of sale, sold property charged with the annuity, by auction. An objection to the title was afterwards taken, and the contract abandoned. The solicitor for the vendor afterwards took an assignment to a trustee, for himself, from the personal representative of the grantor, who did not employ any other solicitor, at the price which it brought at the auction, but without communicating the circumstances as to the title:—*Held*, that such a purchase could not be sustained.

Where a fund has been brought into court under the Trustees Relief Act (10 & 11 Vict. c. 96), and a deed under which a party claims the money is held invalid, the Court cannot, on petition, order it to be set aside—*Semble*.

In such a case the Court will preface an order dismissing the petition, with a declaration that it considers the deed to be invalid.

Observations upon the Trustees Relief Act.

Where trustees who pay money into court under the Act, deduct a sum for their costs, the propriety of that course can only be questioned by filing a bill.

### *In re BLOYE'S TRUST.*

THIS case came before the *Lord Chancellor* by way of appeal from a decision of the *Vice-Chancellor of England*.

The trustees under the will of *Francis Bloye* had paid into court a sum of 1770*l.* 1*s.* 9*d.*, under the provisions of the 10 & 11 Vict. c. 96, as one-fifth part of the residuary estate of *F. Bloye*, being the share which was bequeathed by the will to *William Mitchell Bloye*, subject to the life-interest therein of *Robert Bloye*. The *Vice-Chancellor of England* had made an order upon the petition of *William Lewis* and Messrs. *O. & H.*, by which he ordered the fund in court to be paid out to the Petitioner *H.*, after payment of the costs of the trustees of the will.

The petition was presented under the following circumstances:—In April, 1840, *W. M. Bloye*, in consideration of 600*l.* granted an annuity of 42*l.* to *Elizabeth Pratt* during the joint lives of herself and three other persons. And by the same deed he assigned to *E. Pratt* his one-fifth share in the residuary estate of *F. Bloye*, with a power of sale, in case the annuity should fall into arrear. In the following month of June, *W. M. Bloye* died, and his widow, who afterwards married *James Hillman*, was the sole executrix of his will.

*E. Pratt*, the annuitant, died in 1841, and *Georgiana Woodman* was her administratrix.

The petition, after mentioning these circumstances, proceeded to state, that, in 1846, the annuity had fallen into arrear; and that *G. Woodman*, the representative of the annuitant, with the concurrence of *Mrs. Hillman*, the representative of the grantor, caused the one-fifth share of *W. M. Bloye* in the testator's residuary estate to be put up for sale by public auction, on the 19th of September, 1846; that, in the particulars of sale, it was stated that the sale was by order of the administratrix of an annuitant, under a power of sale; and Messrs. *O. & H.* were stated in the particulars to be the solicitors of the vendors. At the foot of one of the particulars of sale there was the following consent to the sale, which was addressed to the auctioneers, and signed by *Mrs. Hillman*: "I do hereby, as the executrix of the will of my late husband *W. M. Bloye*, deceased, authorise you to sell the reversionary interest referred to in this particular, for not less than 900*l.*, and, when sold, I do hereby agree, out of the purchase-money, and in consideration of the vendor, *G. Woodman*, administratrix of *E. Pratt*, deceased, the annuitant, consenting to the sale thereof at the said sum of 900*l.*, to redeem the annuity above referred to, upon the understanding that the balance of the purchase-money of the above-mentioned property, after payment of your and all other charges and expenses, be paid over to me as such executrix." This consent was procured by Messrs. *O. & H.* from *Mrs. Hillman* before she had proved the will, and they acted as her solicitors afterwards in obtaining probate of it.

At the auction, *Barker* was declared to be the purchaser, for 900*l.*, and an abstract of the title was forwarded to his solicitor. An objection was taken to the title, on the ground that the memorial of the annuity deed was defective, and Messrs. *O. & H.* thereupon returned to him his deposit, cancelled the agreement for sale, and paid him his costs. These circumstances were never communicated by

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Messrs. *O. & H.* to Mrs. *Hillman*, but they determined to purchase the reversionary interest of *W. M. Bloye* on their own account. A deed was accordingly prepared by them, dated the 27th of November, 1846, and made between *G. Woodman* of the first part, Mr. and Mrs. *Hillman* of the second part, and *William Lewis* (who was a clerk of Messrs. *O. & H.*) of the third part. It recited the will of *F. Bloye* and the annuity deed of April, 1840, and that Mr. and Mrs. *Hillman* had contracted with *Lewis* for the sale to him of the one-fifth part of the residuary estate of *F. Bloye*, and thereby, in consideration of 900*l.* paid by *Lewis*, as follows, namely, 679*l.* 10*s.* to *G. Woodman*, by way of repurchase of the annuity, and 220*l.* 10*s.* to *Hillman* and his wife, as personal representatives of *W. M. Bloye*, one fifth-share of the residuary estate of the testator was assigned to *Lewis*. Previously to the execution of that deed, Messrs. *O. & H.* forwarded to Mrs. *Hillman* a statement of their account with her, and wrote to her as follows: "We will thank you to attend here with your solicitor, to settle, on Wednesday or Thursday next; and in the meantime your solicitor can peruse the account and the deed to be signed by you and Mr. *Hillman*." The account was headed, "Mrs. *Hillman* in account with Messrs. *O. & H.*"

*R. Bloye*, the tenant for life, died in September, 1847, and *Lewis* applied to the trustees under *F. Bloye's* will for payment to him of one-fifth share of the residuary estate; but they declined to accede to that application, and paid the money into court.

From the affidavits filed on behalf of the Respondents Mr. and Mrs. *Hillman*, and the persons interested under the will of *W. M. Bloye*, it appeared that she had never been acquainted with the fact that the annuity deed was not valid; but that she believed that the annuitant had power to sell the reversionary interest without her concurrence.

No solicitor had been consulted by Mrs. *Hillman* upon the occasion of the sale in question, but a clerk to a solicitor, who lived near her, had, at her request, had some communication with Messrs. *O. & H.*; the invalidity of the annuity deed had not, however, been communicated to him on her behalf.

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The petition was heard before the *Vice-Chancellor of England* in March, 1849, when the Petitioners consented to be bound by the order, in the same way as if a cross petition had been presented by Mr. and Mrs. *Hillman* and her children, asking for the payment of the fund in court to them.

The *Vice-Chancellor* made an order in accordance with the prayer of the petition, directing the fund in court to be paid to Messrs. *O. & H.* Mr. and Mrs. *Hillman* and her children now brought the question before the *Lord Chancellor*, by way of appeal; and in the meantime, Messrs. *O. & H.* had received the money out of court.

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Mr. *Bethell* and Mr. *Rogers*, in support of the present petition, contended that Messrs. *O. & H.* had allowed the transaction to be carried on without communicating the real circumstances of the case to the parties principally interested; that they had acted as solicitors for Mrs. *Hillman* in part of the transaction, and they treated her as their client in the heading of the account which they sent; when they did not act expressly on her behalf, she had no other adviser; and they stood in such a relation with regard to her, that their concealment of the facts was sufficient to induce the Court to set aside the deed of assignment to *Lewis*.

Argument.

Mr. *Stuart* and Mr. *Lovell*, contra, insisted, that, although Messrs. *O. & H.* had acted professionally for Mrs. *Hillman*



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in some particulars, such as in proving her husband's will, they had never acted for her in giving her any advice, or in being consulted confidentially; that, when the deed of assignment was to be executed, they expressly requested her to attend with her solicitor; that the price which had been given was the full value of the reversionary interest; and that the Court would never have been troubled with this case, if the tenant for life had not happened to die so soon after the sale.

Mr. *Martindale* appeared for the trustees.

Mr. *Bethell* replied.

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Nov. 10th.

The LORD CHANCELLOR:—

Judgment.

I have now carefully read through the affidavits and documents which have been brought under my consideration in this case, and the perusal has only confirmed the impression which I had upon the hearing; for, although there was no great difficulty in ascertaining exactly how the matter stood, yet I did not think it safe to deal with it without a private examination of the evidence on which the question turns.

The *Vice-Chancellor* seems to have assumed, as far as I am enabled to learn what passed before him, that this question turned on its being a purchase of a reversionary interest, and therefore he proceeded to inquire into the price given. But the view which I take of this case makes it quite immaterial to consider that evidence. At the same time, I cannot but observe, that if the rule be that a person purchasing a reversionary interest is bound to shew he gave a fair price for it, these parties have entirely failed in proving that proposition. I do not, however, deal with

that at all, and it is unnecessary that I should: for if the question had related to an interest in possession, the conclusion to which I have come would have been precisely the same.

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The facts of the case, except on one or two points where there is a degree of contradiction or obscurity remaining on the evidence, are very short and very simple. A person being entitled to an interest in certain property (in fact it was a reversionary interest), grants an annuity with a power of sale, that power being given for the purpose of answering any arrears which might arise in the payment of the annuity. That party dies, and his interest is represented by a person who administered to his property. The power of sale being only for the purpose of paying what might be due on the annuity, if there was a surplus it would, of course, belong to the party granting the annuity. It is quite clear, that, in the first instance, the intention was to sell under the power, because there was the power to sell, and the particulars and conditions of sale, as they were printed, would on the face of them shew that it was a sale intended to be carried into effect by virtue of the power. There is no question made that Messrs. O. & H. were solicitors and agents for the purpose of effecting this sale on behalf of the annuitant, or the party who represented the annuitant. A reference is made to them; they direct the sale, they direct the auctioneers, and, in short, they are the agents for the purpose of the sale. But before the sale actually took place, it occurred, and very naturally occurred, that if the personal representative of the grantor were to concur in the sale, it would probably very much facilitate it, and it would be more advantageous; and on the 17th of September we find a written memorandum on the conditions of sale, by which the personal representative, at least the person entitled to be personal representative, and who afterwards became so, (here de-

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scribed as the personal representative,) agrees to join in the sale. That memorandum is a very important one. [His Lordship read it.]

Now, that was procured by Messrs. *O. & H.* from Mrs. *Hillman*. They were about to sell, and they thought it convenient (about which no complaint can be made) that the owner of the fund which was subject to the charge should join in the sale with the incumbrancer, who had the power to sell. They afterwards, in pursuance of the same plan, after the auction had taken place, but in prosecution of the same plan, having procured her concurrence as executrix, took steps for the purpose of investing her with the character which she had so assumed in authorising the sale.

Then, what was the sale which took place under these printed particulars and with the addition of this authority or agreement? It was a sale of the whole interest,—a sale of the property, discharged in fact from the incumbrance. The grantor and grantee, or those who represent them, had agreed amongst themselves in what manner and proportions the fund was to be divided for the purpose of paying off the incumbrance; but, as between the vendor and the purchaser, it was a sale of the two interests by a joint authority given to the auctioneers through the intervention of Messrs. *O. & H.* Now, how it is possible after that to say, that Messrs. *O. & H.* were not agents for the sale, I cannot understand; in short, it cannot be said when the facts are ascertained. They were the agents for the sale, and the sale was with the joint authority of the two parties. There is, therefore, an end of the case. It is not, nor can it for a moment be contended, that they, being agents for the sale, could become purchasers; at least, not without full explanation to the parties interested, and putting them in full possession of the facts, and communicating that



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ability of purchasing which any other trustee would be under. That was the case there, and it did not call for any other decision; but Lord *Eldon* alludes to the fact of the attorney purchasing, and he proceeds to ask a question, in the way which enabled those who were familiar with his mode of putting a question of that sort, to know what answer he would have given, if he had been called on to answer it—whether the attorney could do that which the principal could not; whether, if a party is incapacitated from purchasing, he can employ an agent to do that which he could not do himself; and whether that agent had a power to purchase, which his principal had not? It is the most absurd distinction in the world. Why is a trustee not permitted to purchase? Because the Court will not permit a man to have an interest adverse to and inconsistent with the duty which he owes to another. A trustee for sale is bound to get the best price he can for property to be sold, and therefore, the Court will not permit him to have an interest of his own adverse to the discharge of his duty to his principal. If he is the purchaser, he is interested in getting the property at the lowest price he can. If he is acting *bonâ fide* for the owner of the property, his duty is to obtain the best price he can, and the Court will not permit a party to put himself in a situation in which his interest conflicts with his duty. The Court knows very well, that, taking mankind at large, it is not very safe to allow a man to put his private interest in conflict with the duty which he owes to another. Now, that is the rule; but practically, the agent is the party who is to conduct the sale. In ninety-nine cases out of a hundred the principal takes no part in it: he merely directs it. But the solicitor, the auctioneer, or the agent, whoever he is, is the party who is to conduct it, and on whose exertions the result of the sale depends; and, therefore, to say that the principal is incapacitated, but that the agent is not, would be an absurd distinction; for the reason remains

the same, and is as applicable to one as it is to the other.

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His Lordship then stated the particulars of part of the evidence, and proceeded as follows:—I have, therefore, the direct case of agents for a sale, solicitors employed for the purpose of a sale, surreptitiously, clandestinely, and by concealment and misrepresentation of the facts, endeavouring to become purchasers for themselves, and obtaining a conveyance to a person who is, in point of fact, an assignee for themselves, although he is ostensibly and apparently represented as the real purchaser. It is only necessary to state such a proposition, to shew that such a transaction cannot for a moment be listened to in a Court of equity; and if I had been able to collect these facts with that degree of certainty with which it is the duty of the Court to ascertain them before it disposes of property, and more especially where it has to make a decision which cannot but affect the conduct of those interested in it, many hours of this discussion might have been saved. I consider the case, therefore, is entirely made out as against these proposed purchasers, and I am bound to make such an order as I should have made, if there had been a bill filed to set aside the deed. I am, however, under some difficulty as to the mode in which I am to carry this into effect. I have nothing in Court but this petition. The parties have, from a laudable motive of saving expense, agreed that this matter should be discussed and decided on Messrs. *O. & H.*'s petition asking for the money. So far it is easy enough to deal with it. They have not made out their case for the money, and therefore, it must be brought back into Court. But that is not all *Mrs. Hillman* is entitled to. She is not only entitled to have the money brought into Court, and then to apply again, but there must be something on the records of the Court to shew that the Court has, with the concurrence of both parties,

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adjudicated on this matter of right. I think the agreement includes in it a consent that the Court should make an order to meet that object. I therefore propose, in ordering the money back, to recite the grounds of my decision, and to declare that the deed under which Messrs. *O. & H.* claim, is a deed which the Court cannot act upon, and which ought to be set aside as between Mrs. *Hillman* and themselves; that would be the declaration which the Court might make, if a bill had been filed for that purpose; and it is necessary that this record here should contain such a declaration, in order to clear Mrs. *Hillman's* title from any question being hereafter raised on behalf of Messrs. *O. & H.* If any question were raised, it would, perhaps, be quite competent for the Court, in ordering the money back again, to provide for that. I do not, however, mean to leave the question in that shape and form, because the parties have agreed, without a bill, to deal with it as if there had been a regular proceeding. I think, therefore, that prefacing the order with such a declaration, shewing the grounds on which the money is ordered back again into court; and also shewing the decision to which I have come, and the relative situation of the parties, would do justice between them. It is quite open, then, for Messrs. *O. & H.* to make such case as they may with regard to the mode in which they have dealt with the incumbrance, on the supposition that they were to become purchasers. That is a different matter: that is a question which may be discussed between themselves and Mrs. *Hillman*, when she applies for the fund, or they apply for the fund, on a different title and in a more litigated form; and that will be left entirely open, the money being brought into court; and there will be liberty, of course, to them to make such application as they may be advised to make.

Now, I must say one word as to the proceedings under this Act of Parliament.—I know that some parties have much complained of this Act, as giving to the Court the power

of doing that, without an investigation of the merits, which could not have been done if such an Act had not passed. There cannot be a greater mistake or misrepresentation than that: all which the Act of Parliament has done is to facilitate the mode of getting money into court; it saves the expense of a suit in many cases, saves the expense of new trustees, and leaves this Court open to receive trust-money without delay or expense, in cases where the trustee could pay it into court, after all those proceedings which are necessarily expensive, and necessarily produce delay, by filing a bill for the purpose of obtaining the money on the answer of the trustees. But the money being there, it is just as if it were there in any other form. Suppose the money were paid into court in a suit, and the right to the property depended on a future contingent interest. The Court does not affect the right; the parties are at liberty to apply when the contingency happens; and, if there should be a matter of great doubt and difficulty, the Court would direct a bill to be filed. On the other hand, if it is a matter which the Court can safely dispose of on petition, the Court disposes of it in that manner, in order to save the expense of a suit. It makes no difference how the money comes there: the mode of adjudicating on the rights of the parties remains the same.

But, however desirable it may be as between individuals, to save expense, it is to be regretted that, in this case, the Court has to deal with the question without any proceeding at all: there is not even a petition by *Mrs. Hillman*. The parties have taken on themselves (no doubt from a laudable motive) to act as they have done; but, if the Court permits such proceedings too readily, there may be a very loose mode adopted, which may be very injurious to the general practice of the Court. I should have been much better pleased if I had had to dispose of this matter in a suit, than in the way I have. I have to decide on affida-

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vits filed for a different object,—not on evidence adduced for the purpose of setting aside the instrument, but on a case collected from affidavits and documents, thrown almost accidentally together, in support of a petition not immediately raising the question, whether *Mrs. Hillman* is entitled to have this instrument set aside. It does not interfere with what I have to do in this case, because the parties have, by consent, agreed to give the Court jurisdiction; but I have a doubt whether, on matters of difficulty, it would be safe to come to the Court and ask the Court to adjudicate on such an imperfect state of circumstances as generally arises from matters dependant on affidavits. I do not, however, see any probability of injury in this case. On a petition, the Court has the evidence of the parties themselves, speaking for themselves. Perhaps, there is no great harm in that, when you have the parties on each side telling their own story; for you are not bound to believe either, and you can generally come to some pretty tolerable conclusion. But the great objection is, that, on a petition, you have not the means of compelling other witnesses to speak to the facts within their knowledge. I cannot speculate on what different result I should have come to, if other witnesses had spoken.

The order, therefore, which I make will be to order the money back again, and to refuse the petition of Messrs. *O. & H.*, with costs. I reject their petition for the money, with costs, and order the money back again. I believe that is all I can do.

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Some discussion then took place, whether the Court could order the deed of assignment to *Lewis* to be set aside; it being contended on the one side, that the Act gave the Court power to interfere on petition, as effectually as if a bill were filed. On the other hand, it was

insisted, that, if a bill were filed to set aside this deed, the present Petitioners would not recover all the money from Messrs. *O. & H.* Some part had been properly paid.

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*Judgment.*

The LORD CHANCELLOR said, that refusing to act upon a deed was very different from ordering it to be set aside, and that he should not decide to whom the money ought to be paid; and would make an order for the money to be brought back into court, with a declaration of the reasons why he made the order. The other part of the matter in dispute might then be brought before the *Vice-Chancellor*.

Mr. *Bethell* stated, that the trustees, when they paid the money into court, deducted 82*l.* for costs. There were no means pointed out by the Act, by which the propriety of that deduction could be called in question.

The LORD CHANCELLOR said, that it could only be done by filing a bill.

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The order, after referring to the order of the *Vice-Chancellor*, ordered the petition of Messrs. *O. & H.* to be dismissed, with costs. And his Lordship, considering that the deed, dated the 27th day of November, 1846, was invalid as between Mr. and Mrs. *Hillman*, and *Lewis*, and Messrs. *O. & H.*, as an assignment of the reversionary interest thereby purported to be assigned to *Lewis*, it was ordered, that Messrs. *O. & H.* should repay, on or before the 19th day of December next, the sum of 1757*l.* 16*s.* 8*d.* (being the amount received out of court under the order of the *Vice-Chancellor*) into the Bank, with the privity of the *Accountant-General* of this Court, to the account entitled "In the Matter of the Trusts of *Bloye's Estate*, the Share of *William Mitchell Bloye*," subject to the further

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*Order.*

order of this Court. And the said money, when paid in, was not to be paid out without notice to Messrs. *O. & H.* The order was to be without prejudice to any question as to any liability of Messrs. *O. & H.* to pay interest on the said sum thereby ordered to be repaid by them during the time the same had been and might be in their hands. And it was ordered, that the Appellants and also Messrs. *O. & H.* be at liberty to make respectively such application to the Court in the premises as they might be advised.

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*Nov. 22nd &  
 24th.*

A Plaintiff was arrested upon a writ of attachment for non-payment of costs, but it being ascertained that he was privileged at the time of his arrest, he was discharged out of custody, by consent:—  
*Held*, that the Defendant was not precluded from issuing a second writ of attachment in respect of the same costs.

Practice as to writs of attachment for non-payment of costs, as certified by the Clerks of Records and Writs.

*Statement.*

#### ANDREWES v. WALTON.

THIS was a motion, on the part of the Plaintiff, to discharge two orders of the Vice-Chancellor *Knight Bruce*, one of which was made on the 8th of February, and the other on the 1st of March, 1849; and that a writ of attachment, tested on the 14th of February, 1833, returnable immediately, and directed to the Sheriffs of *London* against the Plaintiff, and on which he was arrested on the 11th of March, 1833, and committed to the *Fleet*, and on which he was still confined for non-payment of 107*l.* 19*s.* 2*d.* costs, might be set aside for invalidity; and that several orders refusing, with costs, various motions by the Plaintiff for his discharge might be discharged; and that the Plaintiff might be discharged out of custody in respect of such writ and certain subsequent detainers.

The Plaintiff's suit had been dismissed, with costs, and that decree had afterwards been affirmed by the *Lord Chancellor*, on appeal. The costs had been taxed at 107*l.* 19*s.* 2*d.*, and for non-payment of these costs a writ of attachment was, on the 12th of January, 1833, issued against the Plaintiff, directed to the Sheriff of *Middlesex*. On the 14th of January, the Plaintiff attended at the Registrar's Office

for the purpose of settling the minutes of the decree made on the appeal; and while there, he was arrested on the writ of the 12th of January. Some doubt being entertained whether the caption was not irregular, on the ground of privilege, the Defendants consented that he should be discharged from custody, informing him of their reason for taking that step, and that he would be liable to be retaken. A second attachment, dated the 14th of February, 1833, was then issued, directed to the Sheriff of *London*, in respect of the same costs, and upon that writ he was arrested on the 11th of March. On the 9th of March, 1833, another writ of attachment was issued against him as a detainer, in respect of another debt. This writ the Plaintiff also sought by his motion to discharge. On the 18th of March, 1833, he had applied to the *Vice-Chancellor of England* for his discharge, on the ground of the irregularity of the caption, and had since made numerous applications for the same purpose, which had been refused, with costs. On the 18th of January, 1849, he obtained, upon motion before the Vice-Chancellor *Knight Bruce*, a return by the Sheriff of *Middlesex* to the writ of the 12th of January, 1833, in which the Sheriff stated that he had taken the Plaintiff upon the writ, and had kept him in custody until the 16th of January, 1833, when he allowed him to go at large, in consequence of having received a discharge from the Clerk in Court of the Defendants.

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Statement.

Before the case was disposed of, the *Lord Chancellor* submitted the following questions to the Clerks of Records and Writs:—

“ Q. Where substituted service of the subpœna for costs is ordered upon the Clerk in Court of the party ordered to pay, is the bearer of the subpœna, at the time of service, warranted by the practice of the Court in demanding the costs of the Clerk in Court, although the order directing

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substituted service contained no directions for that purpose; or is it necessary that the order shall contain such a direction?

A. The bearer of the subpoena was so warranted, and a direction for that purpose in the order was unnecessary, the demand being an indispensable part of the service.

Q. Is a power of attorney necessary to authorize the bearer of a subpoena for costs (not being the party to whom the costs are payable) to serve the subpoena, and demand and receive the costs; and does the fact that the costs are payable to several make any difference?

A. A power of attorney is unnecessary, and the fact that the costs are payable to several makes no difference.

Q. Where the Plaintiff's bill is by the decree dismissed, with costs, is the proceeding by writ of attachment the right mode in the first instance for the recovery of the Defendant's costs?

A. Yes.

Q. Is the original writ of attachment void by reason of essential variance between it and the subpoena for costs, on which it is founded?

A. This would depend upon the nature of the variation. But, if the question applies to the case of *Andrewes v. Walton*, we beg to suggest that there is in that case no essential variance between the subpoena for costs and the attachment founded upon it, and on which the Plaintiff was arrested. The subpoena is in the correct form as used at that period, except that it has been objected by *Andrewes*, that *Walton's* name was omitted, the costs being thereby

required to be paid to *Maitland* and wife, and another, which, we submit, is wholly immaterial, it being well known to *Andrewes* who that other was. In the affidavit sworn by him on the 15th of March, 1833, after stating that the Defendants drew up the decree of dismissal, he says, "They taxed their costs thereunder, the amount of which for *Walton* and *Maitland* and wife was 107*l.* 19*s.* 2*d.*;" and afterwards he says, "that only the Defendants *Walton* and *Maitland* and wife proceeded to enforce payment of such costs by attachment;" and in another affidavit sworn by him on the 9th of December, 1834, he states, "that he received from the Clerk in Court the copy of the order in this cause for substituted service of the subpoena for 107*l.* 19*s.* 2*d.*, under a decree of dismissal of the bill in this cause, payable to the Defendants *William Walton* and *Ebenezer Maitland* and *Mary* his wife;" and also a strip of parchment, of which he sets out a copy, which shews that it was the subpoena so served. It is clear, therefore, he knew the sum to be paid, to whom, and for what. And we are of opinion, that there is no irregularity on that ground.

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 Statement.

*Q.* Is it open to the party to whom costs are payable, to issue two writs of attachment returnable immediately, and running at the same time in the same county?

*A.* It is open to the party to whom the costs are payable, to issue two writs of attachment returnable immediately, and running at the same time, but not into the same county. He might before the return of an attachment, if unexecuted, have it altered, resealed, and re-entered; or, if it had not been delivered to the sheriff, he might, if for any cause desirable or necessary, on delivering up the first attachment to the officer sealing it, but not otherwise, have a new attachment to the same county, also returnable immediately, and the former would be de-

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stroyed. That one or other of the courses here described was pursued in *Andrewes v. Walton* is evident; for it has been ascertained by one of the undersigned, upon a diligent and careful search at the Secondaries' Office, that only one attachment against *Andrewes* for the 107*l.* 19*s.* 2*d.*, costs in that cause, came into the hands of the Sheriffs of *London* in the year 1833, viz. that tested the 14th of February in that year, upon which he was arrested.

*Q.* Where a writ of attachment for non-payment of costs is executed by the party against whom it is directed being taken into custody, and afterwards set at liberty by the party issuing the writ, is it competent to that party, at any future time, of his own accord to issue another writ of attachment for the same costs, leaving the first attachment in the sheriff's hands not returned and undischarged?

*A.* This would depend upon the circumstances under which the party arrested was set at liberty. There might be an arrangement between the parties, which left the matters open to a second arrest.

Or, if the Defendant was discharged on the ground of privilege alone, that would be no satisfaction of the contempt, and the party issuing the writ would be entitled, without having the attachment returned or discharged, to retake the Defendant, either upon that attachment or a new one, for which no order would be necessary.

We are not aware of any reported cases on this point in this Court; but the subject has been frequently before the other Courts, and the practice there considered settled. See, amongst others, *Good v. Wilks* (a), *Plomer v. Ball* (b), *Barrack v. Newton* (c), *Phillips v. Price* (d); see also 8 & 9 Will. III, c. 27, s. 7, upon which it has been held, that on a

(a) 6 M. & S. 413.

(b) 5 A. & E. 823.

(c) 1 Q. B. Rep. 525.

(d) 1 Dowl. & L. 110.

commitment upon an execution, be the escape voluntary or permissive, the Plaintiff might have a new *capias*, or any other execution against the Defendant; and even persons arrested in execution, and by reason of privilege discharged, are, by Statute 1 Jac. I, c. 13, subjected to a second arrest when that privilege has ceased.

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*John Alexander Berrey.*

*John Veal.*

*Frederick Bedwell.*

*Seth Charles Ward."*

Mr. Wood and Mr. Malins, in support of the motion.

*Argument.*

Where a writ of attachment has been once actually executed, the party cannot have a second attachment for the same debt; and a writ of attachment of this Court for the non-performance of a decree is in the nature of an execution for debt: Vin. Abr. Vol. 5, "Contempt," D. pl. 10; *Bartram v. Dannett*, Ib.; and a party could not be taken in execution twice on the same judgment: *In re M'Williams* (a), *Rex v. Stokes* (b). If a sheriff takes a party who is in contempt, and lets him out on bail, and he escapes, the sheriff is liable, because the process is in the nature of an execution, and the injured party cannot have a second process: *Phelips v. Barrett* (c). The same liability exists if a person escapes who has been taken by the sheriff under an attachment for non-payment of costs: *Solly v. Greathead* (d). Even if a party agrees that he shall be taken again, such an agreement is of no force: *Blackburn v. Stupart* (e). In *Williams v. Townshend* (f), the Vice-Chancellor expressed an opinion that a second attachment would

(a) 1 Sch. & Lef. 169.  
(b) Cowp. 136.  
(c) 4 Price, 23.

(d) 11 Ves. 170.  
(e) 2 East, 243.  
(f) 6 Sim. 296.



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*Argument.*

not be valid against a party who had once been discharged under Sir *Edward Sugden's* Act (a). If the writ is once placed in the hands of the sheriff, the second writ for the same purpose cannot be issued: 1 Dan. Chanc. Prac. 429; 1 Smith's Chanc. Prac. 123. The Defendants might have issued a writ into every county in *England*, but they elected to issue it in the county of *Middlesex* only, and, until a return was made to that writ, they could not regularly issue a second: *Robey v. Whitewood* (b).

Mr. *Macqueen*, for the Defendants.

The first writ of attachment was not entered at the Registrar's Office, and, for that reason, the Defendants were entitled to issue another. The Plaintiff was arrested while he was privileged, and there had been a discharge upon that ground. The arrest was not a clearing of the contempt: *Phillips v. Price* (c), *Good v. Wilks* (d). None of the cases which have been cited turn upon the point of privilege. [He referred to the answers of the Clerks of Records and Writs, which had not been given by the Plaintiff to his Counsel.]

Mr. *Wood*, in reply, insisted, that, if the party whose arrest was irregular on the ground of privilege, had applied to the Court, and had got discharged by an order of the Court, there might be a second writ of attachment; but when a prisoner was discharged voluntarily by the party at whose application he was taken, no second arrest could be made without leave of the Court.

*Judgment.*

The LORD CHANCELLOR:—

It was said that the party ought to be brought up before

(a) 1 Will. IV, c. 36.

(b) 5 Beav. 399; 7 Id. 77.

(c) 1 Dowl. & L. 110.

(d) 6 M. & S. 413.

the Court, and then discharged. It could not be the duty of a party who had committed an irregularity, to persist in it until the Court told him that it was an irregularity, putting the other party to inconvenience, and keeping him in prison, and subjecting himself to additional damages. When, therefore, these parties found that the arrest had taken place under circumstances which could not be supported, they were right in allowing the Plaintiff to be discharged. The question was, whether, being so taken irregularly, he could not be taken again. It was an error of the sheriff's officer, and in many cases of that kind, a remedy was given against the person; but there would be the greatest injustice done, if a party were to be protected afterwards merely in consequence of that mistake. The sheriff's officer took the party, if he could meet with him; and he could not, in most cases, have any knowledge whether he was privileged or not. A discharge under Sir *Edward Sugden's* Act could have no reference to the general rule as to process. [His Lordship then referred to the opinions of the Clerks of Records and Writs, and said, that where there was once a legal and regular taking of a party under an attachment, he could not be attached a second time under the same process; but where the taking was irregular, the rule was different, and in that case, a party might be taken a second time under the same process.]

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By the consent of the Defendants, the Plaintiff was discharged unconditionally, but all orders touching the matters in question between him and the Defendants were to be still in force, except as to his imprisonment.

1849.

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29th.

## COOKE v. CHOLMONDELEY.

A testator, seized of large real estates, made a will, by which he gave certain benefits to his daughter, who was his heir, and a married lady; and declared that, if she or her husband, or any person on their behalf, should dispute his will, or if any proceedings should be taken, by any person whomsoever, by any possible result of which any estate or interest could be in any way attainable by his daughter or her husband, of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The testator was the subject of a commission of lunacy when he made his will, and continued

THIS was an appeal from a decision of the *Vice-Chancellor of England*, which is reported in 15 Sim. 611, where all the circumstances of the case are fully stated.

The original bill was filed in December, 1843, by the trustees and executors named in a document, which was alleged to be, and which had been admitted to probate as, the will of Sir *Gregory Osborne Page Turner*, Bart.; and it prayed that the will might be established, and the trusts thereof carried into execution under the direction of the Court, and that the interests of all parties in the estates of Sir *G. O. P. Turner*, by virtue of the said will, might be declared.

In November, 1814, a commission of lunacy issued against Sir *G. O. P. Turner*, under which he was declared of unsound mind. That commission was superseded in November in the following year.

In December, 1823, another commission of lunacy issued against him, under which he was found to have been of unsound mind since the 1st of July preceding. That commission remained in force up to the death of Sir *G. O. P. Turner*, which took place in March, 1843.

His only child and heiress-at-law, *Helen Elizabeth*, had intermarried in 1838, while still a minor, with the Rev. *Charles Gulliver Fryer*, and, by articles executed in contemplation of that marriage, *Fryer* covenanted with trus-

so until his death. In a suit by the trustees of the will, to establish it, the Plaintiffs proved that the testator was of sound mind when he made his will; and there was no evidence to the contrary. Nevertheless, the Court directed an issue *devisavit vel non* to be tried, the Plaintiffs to be Plaintiffs at law, and a gentleman, with whom the husband had entered into a covenant during the infancy of his wife and in the lifetime of her father, to make a settlement of any estates that she might thereafter become entitled to, to be the Defendant at law.

tees to settle certain real estates of his own, and also to join with his intended wife, when she had attained twenty-one, in settling all such real estates as she should at any time be possessed of, to certain uses therein mentioned, for the benefit of himself and his intended wife and their issue. There was no issue of that marriage.

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 Statement.

The will was dated in the month of June, 1841. The testator thereby gave certain benefits to his wife and daughter for their lives; but, in the event of his daughter dying without male issue, the estates, which were of considerable value, were to go over to the issue of the testator's sister. And the will contained a clause, that, if his daughter or her husband, or any person or persons in her, his, their, or any or either of their names, or upon her, his, their, or any or either of their behalf, should dispute that will, or his competency to make the same, or should refuse to confirm it, so far as he or she lawfully could, when required by his executors so to do, or if any proceedings whatsoever should at any time be had or taken by any person or persons whomsoever, by any possible result of which any estate or interest could be in any way attainable by his daughter or her husband, or any person or persons in her right, of larger extent or value than was intended for her by that will, and such proceedings should not be formally disavowed, stayed, or resisted by his daughter and her husband, to the full extent of their, her, or his ability to do so, then he revoked the trust, direction, and disposition thereinbefore contained for her benefit, and gave her 300*l.* a-year only during her life.

Upon exceptions being taken to the answer of Mr. and Mrs. *Fryer* for insufficiency, a question was sent to the Court of Exchequer to obtain the opinion of that Court, whether the clause of forfeiture was valid. The Court of

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Exchequer gave judgment in June, 1846, and held the proviso to be good (a).

The cause came on to be heard before the *Vice-Chancellor of England* in July, 1847, when *Henry Edmund Fryer*, who was one of the trustees of the articles executed on the marriage of the testator's daughter, asked for an issue *devisavit vel non*. The decree of the *Vice-Chancellor*, after stating that the Court was desirous to have the following question decided by a jury, namely, whether *Sir Gregory O. P. Turner* did, by the paper writing in question, devise certain estates, ordered the question to be tried in the Court of Queen's Bench. The surviving trustee named in the will, who was the surviving Plaintiff in this suit, was to be the Plaintiff in the action, and *Henry Edmund Fryer* was to be the Defendant.

*Sir Edward Henry Page Turner* appealed from that decision, and insisted that *Henry Edmund Fryer* had not such an interest under the articles as entitled him to ask for such an issue, but that either it ought to have been asked for by Mr. and Mrs. *Fryer*, or it ought to have appeared by the decree that they waived such issue, in which case no issue ought to have been directed.

Argument.

Mr. *Stuart*, Mr. *Bethell*, Mr. *James Parker*, Mr. *Freeling*, Mr. *Willcock*, Mr. *Lewin*, Mr. *Lee*, and Mr. *Saunders* appeared for different parties.

Judgment.

THE LORD CHANCELLOR:—

Since yesterday I have had an opportunity of considering this case, which certainly is one of the greatest possi-

(a) 14 Sim. 500; and 15 M. & W. 727.

ble importance, not only as it may affect the parties in the cause, but as it relates to the general practice of the Court. The result is, that I cannot accede to the proposition made by the appeal, or alter the decree in the way proposed. I think it is a matter of most serious consideration, for I believe I never had a case before me which more generally affected the jurisdiction of this Court, than that which appears on these facts.

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Here was a lunatic, who was under the protection of this Court for a great number of years: he died, and it appears that, pending the lunacy, and while the commission was in full force, a will was made. That fact does not shew that the will is of necessity invalid. It is very possible that there may have been a time during which the lunatic was competent to make a will, and that such a will, though the commission existed, may be valid. No doubt there is ground for extreme suspicion, and there is the strongest presumption against the validity of the will, arising from the fact of there being a commission existing at the time; but still, it is merely a presumption, and is capable of being rebutted. If that were all, it would not be very peculiar, or attended with any great difficulty; but this paper, which is produced as a will,—and whether it be a will or not I am not at present in a situation to know,—contains within itself a provision to the effect that any party taking any steps to dispute it, shall lose all benefit under it. Now, one of the parties principally interested in the disposition by the will, is the heiress-at-law, so that those who prepared that instrument were desirous that the heiress-at-law, if she disputed it at all, should do so at the hazard of losing all benefit under it, if it were established: the result of which would be, that the heiress-at-law, although she is without any knowledge of the circumstances attending the execution of the will, is prevented from raising any question.

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Judgment.

Then a bill is filed against the heiress-at-law, and against another party, who is to be the Defendant in the issue, and who derives title under the heiress-at-law, she having, in the expectation of what might come, made a provision on her marriage, dealing with her expectant interest as heiress-at-law, together with her intended husband. The Plaintiffs seek to establish the will, that is to say, they undertake to shew that they have a title under it, and that it is a proper will: and they ask the Court, therefore, to establish it. The *Vice-Chancellor* found the heiress-at-law unable in any manner to impeach the will, without being subject, at least, to incurring the penalty which the will attempted to impose on her; and for another purpose, which was altogether collateral, but which was most fortunate, I think, for the disposal of the cause itself, the opinion of the Court of Exchequer was taken as to the legality of that condition, and that Court has certified that it was a legal condition. It is true, the case states that the will was a valid will. Of necessity that is so stated, because the question could not arise if there was no will. But that is a very different view of the effect of that condition, from what arises here, where the question is, whether the will is valid or not. However, the result of that reference to the Court of Exchequer has been the unanimous opinion of the Judges of that Court, that, supposing this will to be unimpeachable, and therefore to be considered as the will of the ostensible testator, this is a legal provision, and that forfeiture would be incurred by breaking the condition so imposed in the will. It is a very fortunate circumstance that that is assumed to be, or rather proved to be, the rule of law, inasmuch as it tends very much to assist this Court in coming to a right conclusion as to the course it ought to adopt. Of course, therefore, it becomes the duty of the Court to be very careful not to expose the party to the chance of this forfeiture; but, at the same time, it is the bounden duty of the Court to see

that it is not made auxiliary to what would, in one view of the case, be a very gross fraud, assuming this paper not to be the will of the testator.

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*Judgment.*

The bill is filed by parties interested under the will, and they ask the Court to establish it. They make Defendants to that bill, the heiress-at-law and the trustees of the settlement, that is to say, the parties who derive interest under the heiress-at-law, having themselves no beneficial interest in the matter, but being bound to protect such interest as was conveyed to them by the settlement of which they are trustees. The heiress-at-law remained passive. Whether she would or would not have done so, if she had been competent to impeach the will, or had been relieved from the condition of forfeiture, or what she might have done under other circumstances, we have no means of knowing. But we know that she had no option; because, according to the opinion of the Court of law, she would have violated that condition if she had not been passive. The Plaintiffs, however, must make out their case. If the heiress-at-law had not been under coverture; if she had been in a situation to admit the validity of the will, and had thought proper so to do, all difficulty would have been removed. The Court would then have had no matter in contest, and all parties concerned agreeing as to the facts on which the Court was to proceed, the Court would, in the ordinary exercise of its jurisdiction, not call for proof where there was no dispute, all parties interested concurring in their statement as to the facts. Those cases, therefore, which have been referred to, in which the Court establishes the will or declines sending an issue, in which there is nobody present but the heir-at-law, have no application to the present case, because in such cases as those there is nothing to try. The Court does not try a will merely because it may itself find some ground of suspicion as to the propriety of its having been obtained; but it directs an issue because the party,



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who alone is interested, and against whom it is to operate, does not admit that it is a good will. What, therefore, under those circumstances, the Court might have thought proper to do, if there had been nobody interested against the will except the heiress-at-law, it is not necessary at all to consider.

But there are other parties than the heiress-at-law, and I think it fortunate, for the ends of justice, that this is so, because, whatever the result may be, it cannot be for the interests of justice, that a fact, which is apparently of so doubtful a character as that which exists in the present case, should not be investigated. Fortunately the heiress-at-law does not represent the interest in the land—an event which would have arisen if there had been an intestacy. She has parted with it to a certain extent; and if she had parted with it altogether, so that she had, though heiress-at-law, ceased to occupy that position, by having invested others with the rights of heiress-at-law, she could not, by her admission, oust the other parties on whom she had conferred the right. She has, in fact, conferred her right on others; she has, by her marriage settlement, endeavoured, at least (I do not say she has done it effectually) on the face of the transaction, to transfer to others that which belonged to her. Then it is said that all this is void; that she was an infant when she married, and that an infant cannot bind her interest in real property, though it is in consideration of marriage, and the marriage subsequently follows. But who is asserting that? Who is setting up this answer to the claim which the bill admits, to the extent at least of making those who claim under that marriage settlement parties to the cause? The Plaintiffs are the parties who raise this objection, and they have no right to be heard at all, till they have shewn that they are what they represent themselves to be, namely, parties having an interest under the will. Whilst the will re-

mains matter of doubt, they have no clear title. They file a bill here, asserting a certain right, and incidental to that right disputing the title of the trustee under the settlement. But they cannot dispute that title until they have established their own, because they have no right at present to bring the matter into question at all. They are premature, and cannot be heard to raise any question till they shew the Court that the ground on which their title stands is a good and valid ground.

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Then the question comes to be decided, have the Plaintiffs or not shewn their title? And that at once comes to the question of the validity of the will. If there is no will, or if the will binding the property is not the act of a party competent to make the will, the Plaintiffs have no right to come here. They may never get so far in the cause as to inquire what Defendants there are, who in that case might or might not have a right to dispute their title. The Plaintiffs cannot challenge the right of the Defendants to be heard, till they have established their own case,—that is preliminary, and they have not yet done so. Who questions their right? The heiress-at-law cannot, on account of this forfeiture; but there are other parties in the cause who can, because there are those who stand on her title, and are fortunately not exposed to the consequences of the forfeiture, and it is their bounden duty, before they are put to shew what right they have to the property under the marriage articles, to resist everything which may impeach that title, which, by the duty they have undertaken as trustees, they are bound to protect. They say, "We do not admit the will; you, the Plaintiffs, cannot say we are not necessary parties here, because you have made us parties as having an interest in the question; and if we are, the Court cannot assume that you, the Plaintiffs, have a title under the will until you have established it." There cannot be a question, therefore,

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that the trustees under the settlement have a right to call in question the title of the Plaintiffs, and to challenge them to shew that they have such a right and interest as they allege upon the pleadings, namely, that they have a will, which takes away all such claim as the trustees have under the title of the heiress-at-law.

It appears, therefore, to me, that, whatever invalidity there may ultimately prove to be in the title of the trustees under the articles, or those who claim an interest under them, on the ground of the infancy of the wife at the time of the marriage, that is a question which cannot be raised till the Plaintiffs have shewn that they are persons claiming under the will. It is competent to the trustees to put the Plaintiffs to the proof of their title. What is the proof of the title of a party claiming under a will? Simply *devisavit vel non*. The sole question is not as to the form: it is not disputed that that is the regular course. The only dispute raised is, whether the party Defendant, who raises that question, is a competent party to ask the Court to try it. Can there be a doubt about it? If the Plaintiffs have a right to be considered as trustees under the will, without any proof, then the trustee of the settlement is deprived of whatever right he may have. Instead of being a title open to dispute, it might have been perfectly free from all objection, if the heiress-at-law had been adult at the time. The testator had still the power of interposing by his will and depriving the heiress-at-law of that which she might have expected. Could it be said, that, in that case, this Defendant would not have a right to say that he claims under a document giving him a clear title on behalf of other persons, unless the Plaintiffs are able to dispute it, and that he raises the question, whether the testator did or not make that will, the effect of which would be to take away from the heiress-at-law that which she had been dealing with, and which, if the Plaintiffs are

right, would be the means of depriving the *cestuis que trust* of the benefit of the settlement which was executed upon the marriage?

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*Judgment.*

It does not appear to me there is really any question, but that the Defendant is entitled to call on the Plaintiffs to prove their title, and that the only way in which a title of this sort can be proved is by such an issue as the *Vice-Chancellor* has directed.

Then comes the present Appellant,—not the Plaintiff, for the Plaintiff is not disputing, as Appellant at least, that this is the right course to be pursued, and that he must establish his title before he can ask the Court to do anything as between himself and the Defendant;—but the person entitled to the first estate of inheritance under the will comes and says, “You are now going to raise a question about the will, and the testator, or at least the person who is supposed to be testator, has done all he can (or it has been done, I should rather say, by the instrument to which his name is appended,) to prevent any question being raised by the will, and you are impeaching the testator’s intention.” I do not enter into the subject of what might be the result, if there was no other interest on the record. But if there be an interest on the record, which the Plaintiff cannot dispute, the Plaintiff having brought the Defendant before the Court in respect of such interest, and it being clear that he is a party to the record in respect of such interest, the Plaintiff cannot say he is not bound to prove his title as against such Defendant. The Plaintiffs have come here for that purpose; they have asked the Court to establish the will as against all persons claiming under the heirship, and this is one of those persons. We are now rehearing the cause. I am hearing the Plaintiff’s case. The Defendant, claiming under the settlement, says, “I dispute your title as claiming under the will.” Are

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not the Plaintiffs to prove their title? That is not disputed. But then they say, it is proved in the cause. A question of this sort is never proved in the cause. If it were so proved,—if the privilege of asking an issue were confined to the heir-at-law alone, and not to those who claim through the heir-at-law,—it would often be difficult to establish a case; because, when an heir-at-law parts with his interest, he parts with all benefit under that interest. That question, however, does not arise here; because, even if this Court were to look at the evidence as it would on any other matter of fact arising between Plaintiff and Defendant, is not this a case, above all others, in which the Court would require the assistance of a jury, to be sure that it came to the right conclusion as to the fact? Is there nothing of suspicion in this case, so as to make it the duty of the Court to ascertain the facts, far beyond what may arise upon any deposition in this Court? Therefore, it is quite immaterial to consider whether the Defendant is or is not armed with the authority of the heir-at-law in demanding an issue; because, if that were overcome, it would be difficult for the Court to say, that it would not be doing the rashest thing possible, in acting on evidence in this case, in which the party who is principally interested in disputing that evidence is precluded, by the insertion of the condition, from giving any evidence to meet it. Whatever, therefore, may be the right of the parties to demand an issue, this is a case in which, as a matter of discretion, the Court would think it necessary to adopt that course. Now, what has the *Vice-Chancellor* done? Why, he has simply done that. He finds the Defendant, the heiress-at-law, disarmed; he finds another party, who is not disarmed, but who is entitled to call on the Plaintiff to prove his case. Then comes the question, how is that proof to be had? Why, according to the ordinary course of the Court on a matter of suspicion and doubt, not on the depositions taken in equity, but upon

the result of an inquiry at law, by an issue *devisavit vel non*.

I think, therefore, that the *Vice-Chancellor's* decree was entirely right; and I should have been very sorry indeed if means had not existed by which, under the circumstances as they appear here, an opportunity could be afforded to the Court of ascertaining, beyond all question, what was the real history of this transaction—this most mysterious and suspicious transaction, as it appears to me. It may be all right—it may turn out to be all correct; but the insertion of that penalty undoubtedly leads to a strong necessity for having the matter fully investigated. If there were nothing else, the mere fact of a will being executed by a party under a commission of lunacy, would make it difficult for the Court to act upon it, without better inquiry than can result from the mode of investigating facts in this Court. It appears therefore to me, beyond all question, that the *Vice-Chancellor's* decree is correct. It is correct in substance, beyond all doubt; and if it could be impeached at all, it could only be upon some technical and artificial ground. However, none exist, when the thing is inquired into—none in point of form, none in point of rule or practice; and therefore the decree must be affirmed.

The only point that occurs to me (and which is not one with which either the Appellant or the Plaintiff has anything to do) is, whether the decree, as it stands, sufficiently protects the heiress-at-law? It does not appear at all upon the order, by whom or at whose suggestion this issue is directed. The heiress-at-law is in that difficult position, that, if she had demanded it—that is to say, if she had done anything to impede the execution of the will—a question might arise, how far she had or not incurred the penalty; and the Court is anxious to protect her, as far as

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possible, against any such question being raised. She is kept perfectly safe, as far as appears at present, from being exposed to such a question; and it is very desirable to preserve her, in future proceedings, from that condition. It appears to me, that the decree would be safer if it had stated that she had not demanded the issue, or that it was demanded on behalf of the trustee under the settlement. It is upon the fact of the trustee of the covenant disputing the validity of the will, that the Court directs the issue; and that is free from all question under the forfeiture. I think it very much safer to introduce some words as a guard. The *Vice-Chancellor* thought that it is safe enough without it; but I think it safer with it(a).

(a) The order of the *Vice-Chancellor* was varied by introducing the words: "And the Defendant, *Henry Edmund Fryer*, contesting the validity of the will, and de-

siring an issue to be granted to try the same," immediately before the words which stated that the Court was desirous that the question should be decided by a jury.

1850.  
 Jan. 31st.

### LISTER v. LISTER.

The *Lord Chancellor* has jurisdiction, as the Judge of one of the superior Courts of record at *Westminster*, to discharge a prisoner under the 48 Geo. III, c. 123.

BY an order of the Court of Exchequer, made in November, 1840, the Defendant *E. A. Lister* had been ordered to execute certain indentures of lease and release; and in consequence of his not executing them, he was committed to the Debtors' Prison for *London* and *Middlesex*, under a writ of attachment, in February, 1841.

In June, 1841, a writ of attachment and detainer issued against him out of the same Court, for non-payment of costs, which he had been ordered to pay; and he had ever since been detained in the above-mentioned prison.

The indentures had since been executed by one of the

Masters, pursuant to the Act 11 Geo. IV & 1 Will IV, c. 36, s. 15.

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*Statement.*

*Lister* had become of unsound mind during his confinement; and a motion was now made on his behalf by a next friend, that he might be discharged out of custody.

Mr. *Randell*, in support of the application.

*Argument.*

Under the 15th rule of the Act 1 Will. IV, c. 36, s. 15, the Defendant would, upon the execution of the deeds by the Master, be considered as having cleared his contempt, except as to the costs. With regard to the detainer for non-payment of costs, under the Act 1 & 2 Vict. c. 110, s. 18, decrees or orders of the Court of Chancery have the effect of judgments; and by the 5 Vict. c. 5, s. 2, decrees of the Court of Exchequer, as a Court of equity, were to be treated as decrees of the Court of Chancery; and under the 48 Geo. III, c. 123, all persons in execution upon any judgment not exceeding 20*l*., and remaining twelve months in prison, may, upon application for that purpose, in term time, to some one of the superior Courts of record at *Westminster*, be discharged out of custody. And that Act directs, that if the judgment was obtained in one of the superior Courts at *Westminster*, the application for the discharge of the prisoner shall be made to the same Court.

Mr. *James Parker*, for the Plaintiff, contended that the Court of Chancery was not one of the superior Courts of record at *Westminster*, within the meaning of the Act 48 Geo. III, c. 123; and that the *Lord Chancellor* was not one of the Judges who were authorised to make such an order as was now asked for. He also contended, that, although a prisoner was discharged as to his contempt, the Act left his estate still liable for costs; and he suggested, that, if



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in this case an order was made for the discharge of the prisoner, it should be drawn up without prejudice to any claim upon his estate.

*Argument.*

Mr. Willcock appeared for other parties.

*Judgment.*

The LORD CHANCELLOR said, that it was quite obvious that this Court had the same jurisdiction, upon such an application as the present, as any of the Courts of common law at *Westminster*. As to any claim for costs upon the property of the prisoner, the order for his discharge would not prejudice any other question; and there was no occasion for the order to contain any provision upon that point. The application must be granted.

See *Tolson v. Dykes*, 1 Ph. 439.

Jan. 15th &  
 18th.

STEVENS v. KEATING.

A bill having been filed to restrain the invasion of a patent right alleged by the Plaintiffs to be their property, the Plaintiffs moved for an injunction, and obtained an order of the Court awarding the injunction, notwithstanding the opposition thereto of the Defendants. The Plaintiffs failed to establish their right in an action at law directed by the Court to be brought by the Plaintiffs in equity against the Defendants, and the bill was eventually dismissed with costs, for want of prosecution:—*Held*, that the Defendants were entitled to their costs of resisting the motion for the injunction.

THIS was an appeal by two of the three Defendants in the cause, against an order made by the *Vice-Chancellor of England*, dated the 10th of November, 1849, disallowing the Defendants, after dismissal of the bill for want of prosecution, the costs of a motion made by the Plaintiffs for an injunction against the Defendants, which was granted by the Court.

The bill was filed on the 21st November, 1846, when notice of motion was given for an injunction against the Defendants, to restrain them from the invasion of a patent right claimed by the Plaintiffs for manufacturing cement. On the 18th January, 1847, the *Vice-Chancellor* granted

in an action at law directed by the Court to be brought by the Plaintiffs in equity against the Defendants, and the bill was eventually dismissed with costs, for want of prosecution:—*Held*, that the Defendants were entitled to their costs of resisting the motion for the injunction.

the injunction, the Plaintiffs undertaking to bring such action at law as they might be advised. On appeal to the *Lord Chancellor* from that order, his Lordship, on the 23rd January, 1847, affirmed the same, so far as regarded the injunction, but directed the Plaintiffs to bring their action in the Court of Exchequer, to be tried at the next Sittings after the then current term, and reserved the consideration of the costs of that application until after the trial, and gave liberty to any of the parties to apply to the Court as there might be occasion. The action not having been proceeded with, the Defendants, on the 29th July, 1847, moved to dissolve the injunction before the *Lord Chancellor*, which was ordered; but the Defendants were, at the same time, directed to keep an account of the matters to be manufactured by them. The action was afterwards tried, and the result was a verdict for the Defendants, founded on the insufficiency of the Plaintiffs' specification; the Defendants, on the 29th November, 1848, gave notice of motion, before the *Lord Chancellor*, to discharge so much of the order of the 29th of July, 1847, as directed an account to be kept by the Defendants, and that so much of the notices of motion of the 18th day of January, 1847, and the 29th day of July, as remained undisposed of, might be disposed of, and that the costs of that application, and of those two motions, might be ordered to be paid by the Plaintiffs. His Lordship, on the hearing of that application, on the 14th of December, 1848, ordered that so much of his former order as directed an account to be kept, should be discharged, but made no order on the subject of costs, which he left to be dealt with by the *Vice-Chancellor*. On the 18th January, 1849, the *Vice-Chancellor* made the usual order of dismissal of the Plaintiffs' bill, for want of prosecution; and under that order the Defendants proceeded with the taxation of their costs before the Taxing Master, who allowed the Defendants their costs of the motions on which the orders

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*Statement.*

were made of the 18th January, 1847, and 29th July, 1847. On the hearing of the Plaintiffs' petition, seeking the declaration of the Court that such costs were improperly allowed by the Master, the *Vice-Chancellor*, on the 10th of November, 1849, expressed his opinion, that the Master had erred in allowing the costs of the order of the 18th January, 1847, but had come to a correct conclusion as to the costs of the order of the 29th July, 1847. From the former part of that order the Defendants appealed to the *Lord Chancellor*.

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*Argument.*

Mr. *Stuart* and Mr. *Glasse*, for the Appellants.

The other side contended, before the *Vice-Chancellor*, that the costs of the original motion for the injunction could not be allowed to the Defendants, inasmuch as the motion was a successful one on the part of the Plaintiffs, and they relied on the first part of the propositions, or rules of practice, promulgated by Sir *J. Leach* (a), viz. "That the party making a successful motion is entitled to his costs as costs in the cause; but the party opposing it is not entitled to his costs as costs in the cause." It was, however, to be observed, that, on the same occasion, Sir *J. Leach* added, "that the Court very rarely gave any special directions with respect to the costs of a motion for the purpose of obtaining, continuing, or dissolving an injunction to stay proceedings at law, leaving the costs of such motions to abide the event of the suit;" which passage was not reconcileable with the proposition mentioned. There had never been any adjudication on the order in question by the *Lord Chancellor*, on the subject of costs, and no order was ever made by the Court touching the costs at the time of the original granting of the injunction; and nothing

(a) 1 S. & S. 357.

can be more just than that the Plaintiff, who fails in his litigation, should pay to the Defendant the costs occasioned by it. The decision in *Finden v. Stephens* (a), on appeal, decided that the costs of preparing to resist a motion for an injunction which was never disposed of, were part of the costs of the suit.

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[The LORD CHANCELLOR observed, that if he had dissolved the injunction because it ought not to have been granted originally, he should have given the Appellants the costs occasioned by them in the Court below, but not the costs of the appeal; and, if he had altered or varied the order made in the Court below, owing to something that had afterwards occurred, he should not at that time have disposed of the costs.]

Mr. *Rolt* and Mr. *Follett*, contra.—A Plaintiff, though he fails in his suit, may be subjected to great and unnecessary costs intermediately, by reason of an improper resistance on the part of the Defendant to an interlocutory order; it may happen that a case is *prima facie* so clear in favour of granting an injunction, that the Defendant ought to raise no question thereon; and if so, the Defendant ought not to be allowed any costs occasioned by any proceedings on his part with reference thereto; but even where a Defendant has incurred costs in an unsuccessful resistance to the Plaintiff's interlocutory application, which the Defendant considers himself entitled to, he ought to take care and have such costs specially reserved by the Court at the time of its making its order. In *Lewis v. Armstrong* (b), the costs of an abandoned motion were held not to be costs in the cause. In *Finden v. Stephens* the demurrer had been allowed, and therefore the cause was out of Court. The Lord Chancellor might, if he had thought proper, have reserved the costs of the application to the

(a) 16 Sim. 40, but not reported on the appeal to the Lord Chancellor.

(b) 3 My. & K. 45.

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Argument.

*Vice-Chancellor*, as well as the costs of the appeal motion, but he only reserved the latter, implying thereby that the Defendants were not to have the costs of the motion before the *Vice-Chancellor*.

[The LORD CHANCELLOR, in the course of the argument, observed, that the first proposition which had been read to him as emanating from Sir *J. Leach*, and which was general in its terms, was not reconcileable with the last passage contained in the report, having reference to the costs abiding the event of the suit.]

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*Judgment.*

His Lordship, without requiring any reply, afterwards added, that he could not recollect ever having seen an order for an injunction which reserved the costs, and that the rule contended for by the Respondents must be a general one, if it had any existence at all; that he had no intention, when the application was made to him in the month of July, 1847, of interfering with the general practice of the Court as to costs; that the question originally was merely, whether there existed a patent right or not; and both Courts agreed in thinking that there was sufficient before them to justify the granting of an injunction pending an inquiry as to the Plaintiffs' title to the patent, but the Court of Appeal directed something in addition to be done, and that when the Defendants applied again to his Lordship, he ordered the injunction to be dissolved on account of the Plaintiffs' delay in proceeding at law to try their right, and not by reason that it had been originally improperly granted, although it was proved afterwards, at the trial of the action, that the injunction had been awarded on the assumption of a right claimed by the Plaintiffs, which was disproved.

His Lordship, after again advertng to the order of July, 1847, and the subsequent dismissal of the Plaintiffs' bill, for want of prosecution, with costs, proceeded as follows:—

A motion is then made to me, which brings the whole merits of the case forward, with the question of the costs of the several orders made; and, for some reason or other, I made no order as to the costs, but left them to be dealt with according to the regular practice of the Court. The matter ending with the dismissal of the bill with costs, the only question remaining for consideration is, whether the Defendants are entitled to the costs of the order by which the injunction was originally granted in the Court below, on the assumption by the Plaintiffs of a right which they cannot maintain. If the rule was as has been contended for on behalf of the Plaintiffs, nothing could be more unjust towards the Defendants, and the rule ought not longer to exist. The result of the proceedings in the cause is, that the Plaintiffs have obtained an order which ought never to have been granted to them, and the costs and expenses, as well as damage, to which the Defendants have been exposed, have arisen from that circumstance; and the obtaining the costs of the cause, without being allowed the costs of the essence of the cause, would be absurd. The case, however, must depend on the practice of the Court as it has been acted upon, which I do not desire to interfere with; and I shall, therefore, direct an inquiry to be made with reference thereto; and if I find it to be the practice of the Masters to tax and allow the costs in question, I shall make an order in conformity therewith.

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Mr. *Stuart* then read to his Lordship a memorandum of Mr. *Martineau*, one of the Taxing Masters, which, he said, was acquiesced in by the other Taxing Masters, to the effect that the costs of the original application and order for the injunction ought to be allowed the Defendants; after which,

Mr. *Rolt* observed, that even if the practice should turn out to be as stated by Mr. *Stuart*, still the Plaintiffs ought to pay the costs of the petition before the *Vice-Chancellor*; but

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The LORD CHANCELLOR said, that he should direct inquiry to be made into the practice, and if he found it to be in favour of the Appellants, he must give them the costs of that petition.

In the course of the same day,

The LORD CHANCELLOR stated that he had just received a certificate from all the Taxing Masters, in favour of the Defendants' costs of opposing the motion for the injunction being costs in the cause, and that his order would be accordingly.

On the 18th of January, the LORD CHANCELLOR again mentioned the fact of his having received the certificate of the Taxing Masters, to the effect already stated, viz. that the costs of the injunction followed the result of the suit on its dismissal, and that he quite approved thereof.

Jan. 16th.  
 Feb. 8th.  
 March 2nd.

Where the protector of a settlement resides in Ireland and is a lunatic, the Lord Chancellor of England, and not the Lord Chancellor of Ireland, is authorised by the 3 & 4 Will. IV, c. 74, to consent, in his stead, to the barring of the estate tail and the remainders over in hereditaments which are situate in Wales—*Semble*.

*In re* RICHARD HERBERT GRAYDON, a Lunatic.

THIS was a petition of *William Maxwell* and his wife, and the trustee of their marriage settlement, asking the consent of the *Lord Chancellor*, as protector under the Act of 3 & 4 Will. IV, c. 74, to the settlor's enlarging the base fee created by their settlement, into an estate in fee simple absolute, in certain hereditaments in *Wales*, of which the lunatic was tenant for life, and the Petitioner, *Mrs. Maxwell* (who was his daughter and only child), was tenant in tail in remainder.

Where a proposed settlement on the marriage of the only child of a lunatic tenant for life would have the effect of excluding the brother of the lunatic, and of enabling her to give the hereditaments to her husband in preference to her issue, the *Lord Chancellor*, as protector of the settlement, refused to give his consent to such an arrangement.

The hereditaments had been devised to the use of the lunatic, who was now a widower, for life, with remainder to his sons in tail, with remainder to his daughters in tail.

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By the settlement executed on the marriage of Mrs. Maxwell, the estate tail was barred, and the property was resettled on herself for life, with remainder to her husband for life, with remainder as she should appoint, and in default of appointment, for the benefit of the issue of the marriage.

The lunatic resided in *Ireland*, and had been found lunatic by inquisition in that country.

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Mr. Anderson supported the petition.

Argument.

[The LORD CHANCELLOR.—The lunatic living in *Ireland*, why do you come here? Why not apply to the *Lord Chancellor of Ireland*? He is intrusted with the care of this lunatic, and the power to act as protector is given, by the 33rd section of the Act, to the person who has the protection of the particular lunatic. Suppose a person to have been found lunatic here, it would be a very inconvenient proceeding to go to the *Lord Chancellor of Ireland*.]

The case has been well considered by the lawyers in *Ireland*, who are of opinion that the *Lord Chancellor of Ireland* has no jurisdiction. The Act is territorial. Suppose a case of a lunatic residing in *Scotland*, the lands being in *England*: the Courts there have no jurisdiction. The Act was passed to simplify the alienation of estates in *England*, and it would be a great inconvenience to have to apply to a particular Court where the lunatic happened to be—*India* for instance, or *Holland*—for consent to affect estates in *England*. This Act is confined to estates in



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*England*, and the Irish Act to estates in *Ireland*. It is a family arrangement, and the parties are quite willing to take the risk of this proceeding being inoperative.

*Judgment.*

The LORD CHANCELLOR, after reading the Act, observed, that the import of it was certainly to deal with property in *England*, and his Lordship made no further objection to granting the order.

*Feb. 8th.*  
*Statement.*

Upon application to the Secretary of Lunatics for the order, he called for the consent of the brother of the lunatic, who was the remainder-man; and the matter was again mentioned to the Court upon the question, whether it was necessary that the remainder-man should be before the Court.

Reference was made to the case of *In re Newman* (a), where the lunatic was, according to the original settlement, tenant for life, with remainder to his children as tenants in common in tail, with remainder to the brothers and sisters of the lunatic as tenants in common in tail, with the ultimate remainder to the right heirs of the testator; but the *Lord Chancellor* refused to consent to a deed, the effect of which would be, to give the property to strangers. The 15th, 34th, 48th and 92nd sections of the Fines and Recoveries Act (3 & 4 Will IV, c. 74) were referred to.

*Judgment.*

The LORD CHANCELLOR said, that he was glad an opportunity had been afforded him of looking more particularly into this case. He understood, on the former occasion, that the arrangement had the concurrence of all parties. He was asked to exercise a discretion. The Act placed him in the

(a) 2 My. & Cr. 112.

same situation as the tenant for life. He should now withdraw the consent which he gave; for it appeared to him, that the father (the lunatic) ought not to concur, and that he (the *Lord Chancellor*) ought not, legally or morally, to consent to such a settlement. It allowed the daughter to take all the estates away from her children, and gave her power to dispose of them as her husband might induce her. It took all away from her children and the brother of the lunatic, and gave it, in fact, to the husband.

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Judgment.

The case was again mentioned to the *Lord Chancellor*, March 2nd. when he declined giving his consent to the proposed arrangement.

*In re* TOWNSEND, a Lunatic.

Jan. 25th.

THIS was a petition on the part of a mortgagor, who was the husband of one of the *cestnis que trust*, seeking to confirm the Master's report, a reconveyance of the mortgaged premises, and the appointment of new trustees in the place of the lunatic, and that the costs of and incident to the application might be ordered to be paid out of the lunatic's estate. The lunatic was the trustee named in the will of *Jane Kelson*, and, as such, had advanced the mortgage-money; but there was no actual proof, although it was very probable, that the mortgagor knew that fact.

In the case of a petition by a mortgagor, seeking to confirm the Master's report as to a lunatic mortgagee, and a reconveyance of the mortgaged premises, and appointment of new trustees, there being no proof that the mortgagor was aware of the lunatic being a trustee, the costs of and incidental to the application were ordered to be paid out of the trust estate.

Mr. *Kinglake*, in support of the petition, referred to the case of *Ex parte Lewes*(a), which, however, differed from the present, inasmuch as in the former case there was an express declaration in the mortgage deed that the sum ad-

(a) 1 Hall & T. 123.

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 {  
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vanced was trust-money. The case of *In re Townsend* (a) was also referred to.

The LORD CHANCELLOR said, that the petition was not an exception to the rule; that, in *In re Townsend* the lunatic was beneficially interested; that, in the present case, which was merely that of the transfer of the trust estate to new trustees, there was no proof that the mortgagor knew that the lunatic was a trustee; and, therefore, the general rule must prevail.

The order made was for the confirmation of the Master's report, with the usual directions for the transfer, and an order for payment of the costs out of the trust estate.

(a) 2 Ph. 348.

Feb. 25th.

#### THE ATTORNEY-GENERAL v. PILGRIM.

In 1699, a lease of charity land was granted for 999 years, at a rent very little more than had for some time been received for it. The lessee covenanted to build upon the land. That lease was in 1849 set aside as to a part of the land comprised in it, on an information filed against the assignee of that part only; and he was held not to be entitled to any allowance in respect of the building which had been erected upon the land.

THIS was an appeal from a decision of the *Master of the Rolls*, which is reported in 12 Beavan, 57.

The object of the information was to set aside a lease of some charity lands at *Norwich*, which had been devised, in the year 1521, to charitable uses for the benefit of the parish of *St. Andrew*, in that city.

The lands had remained under the control of the churchwardens for the time being; and in 1699 the lease in question was granted by certain parties, who were described as trustees on behalf of the parish and the churchwardens, for a term of 999 years, at the yearly rent of 10*l*. The lessee

to be entitled to any allowance in respect of the building which had been erected upon the land.

covenanted to expend 300*l.* in building on the land, and the rent was stated to be "for the use, benefit, and sustentation of the said parish."

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The land had been previously let for 8*l.* or 9*l.* per annum.

In 1810 the lease had become vested in *Robberds*. He sold a part of the land to *Smith*, subject to an annual rent of 1*l.*, as the apportioned part of the rent of 10*l.* reserved in the lease of 1699.

In 1830 *Smith* assigned this part to *Pilgrim* for the residue of the term, subject to the rent of 1*l.*, and *Pilgrim* paid him 200*l.* This part of the property consisted of a shop, which was let at a gross rental of 8*l.* 8*s.* a-year. *Pilgrim* denied having had any notice of the charity, except what he had derived from the statements in the abstract of the deed of 1699.

The *Master of the Rolls* considered that the lease could not be supported, and that the Defendant was not entitled to any allowance in respect of the building which had been erected upon the land; and that, although the persons who were interested in the other parts of the land which was comprised in the lease of 1699, were not before the Court, he ought to make a decree in accordance with the prayer of the information, with costs. The Defendant *Pilgrim* appealed from that decision.

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Mr. *James Parker*, Mr. *Rogers*, Mr. *Roupell*, Mr. *Elmsley*, Mr. *Rolt*, and Mr. *Baggallay* appeared for the different parties.

Argument.

The following cases were cited:—*The Attorney-General*

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v. *Green* (a), *The Attorney-General v. Brettingham* (b), *The Attorney-General v. Owen* (c), *The Attorney-General v. Backhouse* (d), *The Attorney-General v. Foord* (e), *The Attorney-General v. Pargeter* (f), *The Attorney-General v. The South Sea Company* (g), *The Attorney-General v. Cross* (h), and *The Attorney-General v. Lord Hotham* (i).

*Judgment.*      The LORD CHANCELLOR:—

It appears to me, upon a review of the authorities, that there is no ground upon which this decree can be impeached. In short, there is nothing which approaches near to an authority to justify the position taken up by the Appellant, except the case of *The Attorney-General v. The South Sea Company*, which comes nearest in point of circumstances to the present; and I must say, that I think if the question were, whether that case should be supported, or all the other cases if they differ from it, I should be much more disposed to find fault with *The Attorney-General v. The South Sea Company* than to depart from the general rule—a rule which has been of great benefit, not only to charities but to those who are dealing with charity property. The rule should be ascertained and known, and not depend upon the particular circumstances of each case, although, no doubt, circumstances may arise which may justify a departure from it; but it is an established rule of this Court, that it is its duty to maintain, that leases of this sort, amounting to an alienation, are, *primâ facie* at least, not to be supported; and those who claim benefits under them take them, therefore, with a knowledge that they are liable to be impeached,

(a) 6 Ves. 453.  
 (b) 3 Beav. 91.  
 (c) 10 Ves. 555.  
 (d) 17 Ves. 283.  
 (e) 6 Beav. 288.

(f) 6 Beav. 150.  
 (g) 4 Beav. 453.  
 (h) 3 Mer. 524.  
 (i) T. & R. 209.

and that they subject themselves to such consequences as the ordinary decree for that purpose would expose them to.

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Now, here is a lease of property, the value of which one cannot judge of. The rental which property produces, depends upon its locality and the purposes to which it is applied, and also upon the interests of individuals in the neighbourhood who possess other property of that description. Therefore, to say that the rent is a large rent for a small portion of land, without reference to the circumstances connected with the land or the position of the place, is really saying nothing. We have, however, a fact, that, at a period anterior to 1699, when the lease in question was granted, the land in question was, for two successive periods, let for 9*l.* a-year. Now, there is no reason at all to say that that was not a *bond fide* rental: at least, it must be assumed to be so. The leases are produced by which the rent was reserved, and I must assume that the land was worth, to let, 9*l.* a-year, which shews that the present transaction is an actual alienation for ever, (that is to say, for 999 years, which is in effect an alienation for ever,) at an additional rent of 1*l.* a-year. That, of itself, would bring the case clearly within the authorities, that an alienation for such an apparent consideration as this is, cannot be supported. If we look to the fact of what might become of the property and what value it might attain, it is now, of course, much more palpable than the mere speculation of what naturally must have been the result of such a transaction in the year 1699. At that time of day, it was known that land in a town or neighbourhood such as *Norwich* was very likely to increase in value; and therefore, it was an alienation for which, upon the face of it, there was no adequate consideration.

The rule of the Court is, unquestionably, that such a

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transaction as that cannot be maintained. But it is said, that particular circumstances may justify the transaction. It is for the Defendant to prove those circumstances; and I understand the Defendant has gone into no proof at all: he has produced nothing to raise a *prima facie* case on his behalf, or any ground for inquiry as to there having been any peculiar circumstances connected with the original letting, for taking it out of the general rule. There is an alienation, which is, apparently, for a very inadequate consideration, as compared with the rent reserved upon an ordinary lease; and this alienation is for 999 years. It will not do for the Defendant to abstain from going into any evidence, or bringing any case before the Court, and then, at the hearing say, "Now direct an inquiry, there being no foundation whatever for it, to see whether I cannot make out the defence before the Master, which I have not attempted to make out before the Court." That would be involving parties in an unnecessary and expensive litigation. It is the duty of the parties to bring the case fully before the Court. Suppose the case of an information depending upon evidence, which may not be conclusive, but which may still raise a case for inquiry: that is a ground upon which the Court will proceed; but there is nothing of that kind in this case, and there is no evidence touching the original transaction, produced by the party occupying part of the land contained in the original lease. It was indispensably necessary, of course, to deal with that original lease, for that is the foundation of the equity which the Court is called upon to administer. I find a case, therefore, in which a party is holding charity land for 999 years without any apparent consideration, and not explaining why, or how it is, that those parties, who had the care of that property, thought proper to create such a lease. I should be undoing what has been done from the period of the earliest case cited, viz. *Attorney-General v. Green*, if I were to hesitate for a moment in saying that this case falls within the rule established in the

cases which have been referred to: and there is no exception established on the part of the Defendant.

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 —  
*Judgment.*

The question of costs is, undoubtedly, a very different one; and I cannot but suppose it forms a very material part of the question upon this appeal, on the part of those who advised it. There is, however, nothing, as it appears to me, upon the pleadings to raise a doubt as to the propriety of the *Master of the Rolls'* decree. I think the principle of the *Master of the Rolls* is that upon which I ought to act, and which is reasonable; namely, to inquire who has occasioned the costs? Why, the party who has caused the institution of the suit. If, upon being applied to, resistance had not been made, the expense would not have been incurred. It is no new discovery—it is not any new fact which the Defendant was not at all aware of at the time the application was made—which led to this decree. He knew of the application made, because it turns entirely upon the origin of the title to the land which he is holding himself; that it is charity land, alienated without any apparent reason why that alienation should take place. Besides that, he not only resisted the title of the charity when the claim was made, but he resisted it at the hearing, and he resists it here: and by resisting it, the costs have been incurred. He has a right to resist it, no doubt; but the question is, whether, when we come to consider the costs, we are not to remember who the party is who has occasioned these expenses. It is a party who has set up a title which he cannot maintain. It appears to me that it is a very wholesome rule, that the first question for the Court to consider is, who has occasioned the litigation—whose fault is it that the costs have been incurred? I cannot hesitate for a moment to say, that the costs have been occasioned by a party who has resisted a just and reasonable claim upon the part of the charity.

Then it is said that the churchwardens have concurred.



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—  
*Judgment.*

It is not the expense of the churchwardens concurring: it is the expense of that litigation which the Defendant has made necessary; and the costs in question of those parties form part of the costs of that litigation. The proceedings could not go on without those persons, and therefore they were necessary parties, and the Defendant ought to pay the costs of the litigation; and I think he ought to pay all the costs that have been occasioned. I cannot make the Plaintiff pay them: and the question is, how I am to make these public officers pay the costs themselves, who could not help being brought here if the Defendant thought proper to resist the claim, whatever their previous approbation and conduct may have been. When this question commenced they could not help themselves: they had not the power to give up the lease; and, the principal Defendant choosing to uphold that lease, made it necessary for the *Attorney-General* to bring before the Court, not only himself, but the other parties, whose costs are now in question. Their costs are, therefore, part of the costs of the general litigation; and whatever may have been the motive of those who advised such an appeal as this, there being such a small property concerned—property apparently of little value—still the litigation has been occasioned, and the costs must be paid, either by the party who is the cause of the litigation, or by those who have necessarily incurred those expenses by the resistance of the Defendant. I very much regret that he should have those costs to pay; but I do not think I have any other choice than to affirm the *Master of the Rolls'* decree: and, unfortunately, the costs of this appeal must be included in the costs incurred in the Court below.

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GOODALE v. GAWTHORN.

Nov. 9th &  
10th.

TWO suits had been instituted in the name of an infant, by different persons acting as her next friends. One was attached to the Court of the *Vice-Chancellor of England*, and the other to the Court of the *Vice-Chancellor Knight Bruce*. On the 19th of December, 1848, the common order had been obtained from the *Vice-Chancellor of England* in both these causes, by which order it was referred to the Master to inquire whether the bills were for the same matters, and if so, which of the suits it would be most for the benefit of the infant Plaintiff to prosecute. On the day on which the order was made, a decree was obtained in the suit which was attached to the Court of the *Vice-Chancellor Knight Bruce*, but that decree was not to affect the order of reference. Shortly afterwards a demurrer was filed to the bill which was attached to the *Vice-Chancellor of England's* Court, whereupon an order was obtained to amend, and that bill was amended. The Master then declined to proceed with the reference, and indorsed a memorandum upon one of the states of facts which were laid before him, in the following terms:—"I think that a demurrer having been put in to the bill in the first mentioned cause, after the order of reference of 19th December, 1848, and such demurrer having been submitted to, and the bill substantially amended, I cannot proceed under the above order of reference, without a further order of the Court."

After a reference had been directed to the Master to inquire which of two suits ought to proceed for the benefit of an infant, a demurrer was put in to one of the bills, and it was amended:—*Held*, that the Master ought, notwithstanding, to proceed with the reference.

Statement.

The next friend in the first suit then caused a petition to be presented in both suits, which was of considerable length, and on which an order was obtained from the *Vice-Chancellor of England*, that the Master should proceed with the reference; and his Honor reserved the question of costs. The Plaintiff, by her next friend in the other suit, now pre-

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sent a petition to the *Lord Chancellor*, by way of appeal, praying that that order might be discharged.

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*Argument.*

Mr. *Rolt* and Mr. *Selwyn*, in support of the application, contended,

I. That by amending the bill, the parties had put it out of the power of the Master to proceed effectually with the reference, and that one of the bills which were to be submitted to him was no longer in existence after the amendment.

II. That the *Vice-Chancellor of England* had not jurisdiction, without the previous direction of the *Lord Chancellor*, to make an order in two suits, one of which was attached to another Court; and therefore his Honor's order of December was invalid; and that it was not a matter of course to obtain such an order of reference after a decree: *Taylor v. Oldham* (a), *White v. Johnson* (b).

III. That the costs ought to have been disposed of when the motion was made.

Mr. *Bethell* and Mr. *Webster*, *contra*, contended,

I. That an order of reference did not stay proceedings in a suit, nor could a party, by taking a step, frustrate the order; that the bill, as amended, was that which the Master must examine under the order of reference: *Watson v. Life* (c); that, upon such a reference, the Master was always at liberty to suggest any amendment, for the benefit of the infant: *Sullivan v. Sullivan* (d), *Da Costa v. Da*

(a) Jac. 527.

& Gor. 104.

(b) 2 Ph. 689.

(d) 2 Mer. 40.

(c) 1 Hall & T. 308; S.C. 1 Mac.

*Costa* (a); and that, ever since *Stapilton v. Stapilton* (b), the Court always considered the interests of infants with more favour, in regard to technicalities, than it shewed to adults.

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Argument.

II. That, if the parties had wished to discharge the *Vice-Chancellor's* order, he was the Judge to whom they must have applied for that purpose; and if they wished to know whether that order was still in force, surely they were right in submitting the circumstances to him, and no new order was asked for.

III. That the reservation of the costs of the motion was a question of discretion, with which a Court of Appeal would not unnecessarily interfere.

Mr. *Rolt* replied.

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The LORD CHANCELLOR:—

Nov. 10th.  
Judgment.

This case raises a point of pure technicality, on a matter relating to the interest of an infant; and, of all the cases which can come before the Court, that is a matter which the Court is least disposed to listen to. As a protection to the infant, two suits are instituted, and it is alleged that they are both for the same purpose; and in such a case the practice of the Court is, to send it to the Master, to inquire whether they are for the same purpose, and if they are, then to select which of the two shall go on, in order that the infant's property may not be wasted by double litigation having one object in view. No question appears to be made as to the regularity of the original order of reference, because, although it was not served till after the

(a) 3 P. Wms. 140.  
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(b) 1 Atk. 6.  
P

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decree, what passed at the time before the Vice-Chancellor *Knight Bruce* precludes the parties from raising any objection. I consider, therefore, there was a perfectly regular order of reference to the Master, to inquire which of the two suits should proceed, the preliminary inquiry being, whether they were for the same purpose. If they are not for the same purpose, then the Court does not interfere, and the parties go on at their own risk. After that reference had been made, the next friend of the infant in one suit amended the bill. The Master does not make a certificate or report on the subject, but there is a memorandum furnished, by which the Master says, that, under those circumstances, there being a demurrer and an amendment, he was not at liberty to go on.

The first question is, whether that is correct; whether a party amending his bill necessarily withdraws from the Master the inquiry which the Court has directed in both suits. I am very clearly of opinion he does not. The object of the reference is to know which suit is to go on. The bill is only referred to as evidence of what the suit is for. It contains a statement of the case made on behalf of the infant. Whether that is stated in the original or amended bill, still it remains the bill on which that particular suit is to depend, and the Master has to look into that bill to see what the next friend has alleged in that suit on behalf of the infant; and it would be a most extraordinary thing that that reference should stay the proceedings in the cause. It would be staying proceedings by amendment. In many cases you cannot advance a step without amendment. A question is raised by demurrer, shewing a defect for want of parties; and there is a reference, which, it is contended, is a stay of proceedings in that cause; because you cannot get rid of the objection, except by amendment, and, according to the doctrine contended for, you are not at liberty to

amend. I think the Master has fallen into an error in considering the matter of amendment, on this demurrer, as ousting him of his jurisdiction under the order. Now that is the whole case. If the Master ought to go on, then all the *Vice-Chancellor* has said is, "You ought to go on."

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Then comes the question as to the objection made, viz. that though it was quite regular for the *Vice-Chancellor* to make the original order, (for that is not disputed,) yet it was irregular for him to direct the Master to proceed with that order. If he is not to do it, who is to do it? The Master says, that he cannot and will not go on: that he is not at liberty to go on, without the direction of the Court. The parties then merely ask the opinion of the Court, whether the Master is right. The Court is of opinion that the Master is wrong. Now you could not go to *Vice-Chancellor Knight Bruce* on that point, because he did not make the order. It appears to me, there was no way of removing the Master's difficulty than by going to the *Vice-Chancellor* who made the order. He is the best judge of his own order. The parties ask the Judge whether the Master is right in not proceeding with the order which that particular Judge has made. I cannot think there is anything in either of those two objections. The order, therefore, which the *Vice-Chancellor* has made is correct, to the extent of directing the Master to proceed.

Then comes the question, which I certainly do not see any necessity for the *Vice-Chancellor* having postponed the consideration of—the question of costs. All the parties desired to know was, whether the Master was right or wrong. They were stopped: they could not help themselves. The Master thought himself precluded from going on, and they could not oblige him to go on, without the in-

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Judgment.

terposition of the Court. What they came for, was simply to know whether that demurrer and that amendment were properly considered by the Master as a suspension of his proceedings under the order. What the parties really had to ask the Court, might have been contained in six lines. The Court had referred the merits in both suits to the Master. The sole question was, whether what had taken place superseded the efficacy of that order. Why the Court should not have disposed of the costs at that time, or what the Master's certificate had to do with the length of the petition, or how it can affect the decision of the Court, as to whether the petition was properly or improperly extended to that length, I do not understand. I doubt whether I can interfere with the mode of management of the business of each particular Court. The Court might say, "I do not think it convenient to dispose of this petition now, but I will dispose of it in another stage of the cause." The *Vice-Chancellor* has a discretion, and there would be no end of applications here, if every adjudication of that sort was matter of appeal. There is no injustice done to the parties, unless it be this, viz. that, instead of having the matter decided to day, it would probably be decided on the next petition day; because the inquiry before the Master is not a thing of protracted delay. It is a matter of that sort which can be disposed of as soon as you look into the two bills. Therefore, I cannot understand that there was any delay, or any evil arising from not deciding the question of costs when the matter was before him. Some expense and some little delay might have been saved, if the Court had made the order and disposed of the costs then; but the Court did not see why the applicant had extended the petition to so great a length, and therefore thought it proper and more safe to dispose of it at a future time. It will be necessary for the matter to be mentioned again, but it might, perhaps, have been disposed of when it was before the

Court in the first instance. But I cannot interfere on that ground.

I think, therefore, the application here must be refused with costs.

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In a suit of *Fletcher v. Moore*, before the *Master of the Rolls*, which is reported 11 Beav. 617, his Lord-

ship decided, that, after a similar reference had been directed, an order to amend was irregular.

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SAUNDERS v. WALTER.

Nov. 26th.

THIS was an application to discharge or vary an order of the *Vice-Chancellor of England*, of the 20th of September, 1849.

Two of the Defendants were ladies of unsound mind, but not found so by inquisition. An appearance had been entered for them on the 31st of July, 1849, and on the 11th of September—the day on which the time for answering expired—the Master allowed them two weeks' further time for answering. On the 13th of September, an order was obtained from the *Master of the Rolls*, on the petition of these two Defendants, that they should be at liberty to sue out a commission to assign them a guardian *ad litem*.

On the 20th of September, a motion was made before the *Vice-Chancellor of England*, on behalf of the Plaintiff, under the 32nd Order of May, 1845, that the solicitor named in the notice of motion should be appointed guardian *ad litem* for the two Defendants. His Honor refused the mo-

Where Defendants had taken no proceedings until the last day allowed for putting in their answer, when they obtained an order for further time, but afterward obtained the appointment of a guardian *ad litem*, on the ground that they were of unsound mind, the Court refused an application of the Plaintiff, under the 32nd Order of May, 1845, to appoint a guardian for them, on the ground that they were in default for want of answer.



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tion, with costs; and this was the order which the present application sought to discharge.

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*Argument.*

Mr. *Cooper* and Mr. *J. S. Moore*, in support of the application, contended, that under the 32nd Order of May, 1845, if a Defendant who was of unsound mind made default in not answering, the Plaintiff might apply to the Court, that a solicitor might be assigned guardian to defend the suit on behalf of such Defendant. That the fact of these Defendants being of unsound mind was admitted by their own application for a guardian: but that, being in that state, they were not entitled to apply for further time for putting in an answer. The application for a guardian should have been made first, and therefore the Plaintiff ought not to lose the benefit which was provided for him by the 32nd Order.

Mr. *Rolt* and Mr. *Hore*, *contra*, were not heard.

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*Judgment.*

The LORD CHANCELLOR said, he thought the proceedings of the Defendants had been perfectly regular, and that the *Vice-Chancellor* was quite right in refusing the motion, and the present application must therefore be refused with costs.

1850.

## BAGSHAW v. THE EASTERN UNION RAILWAY COMPANY.

Feb. 1st, 5th,  
7th, & 9th.

THIS was an appeal from the decision of the Vice-Chancellor *Wigram* overruling the demurrer which had been put in in this case. The allegations in the bill, and his Honor's judgment, are fully reported in 7 Hare, 114.

The *Eastern Union Railway Company* was authorised by several Acts of Parliament to make railways from *Colchester* to *Ipswich*, *Ipswich* to *Bury St. Edmunds* and *Norwich*, and from *Ipswich* to *Harwich*, and, for those purposes, to raise monies by shares and loans, not exceeding certain sums in the whole. The same Company was also, by a

Mr. Wood and Mr. Daniel appeared in support of the appeal; and

The *Solicitor-General* and Mr. Grove, contra.

THE LORD CHANCELLOR:—

This is a bill filed by a person who describes himself as

distinct Act, authorised to purchase and complete the *Hadleigh Junction Railway*, and, for that purpose, by shares or loan to raise a sum not exceeding 100,000*l.* In a suit brought by the proprietor of a scrip certificate for stock, forming part of the capital raised in pursuance of the Acts authorising the Company to purchase the *Hadleigh Junction Railway* and make the *Harwich* line,—charging that the Company was about to misapply such money in the construction of the *Norwich* line, and seeking to restrain such misapplication,—the demurrers of the Company and the Directors, for want of equity, were overruled.

Where a Company is authorised by Act of Parliament to raise monies for a specific purpose only, it is not competent to any majority of the shareholders of the Company to divert such monies to another purpose against the will of a single shareholder, nor could unanimity amongst the shareholders make such a diversion lawful.

Whether a Company, having powers to construct several branch and extension railways, and to raise certain distinct sums of money for such respective works, such monies being declared to be part of the general capital of the Company, may or may not lawfully apply monies in the execution of one undertaking, which they were empowered to raise for another,—*quære*.

The Company, in its corporate character, was properly made a Defendant to such a suit by some of the members.

The proprietor of a scrip certificate, whether registered or not, (such proprietor not being in default,) may sue on behalf of himself and all other proprietors of like certificates, and of the stock which they represent or into which they are convertible, where the proprietors of certificates and stock are very numerous; there being no incompatibility in the interest of the registered and unregistered proprietors to preclude the Plaintiff from representing both classes of persons.

The original subscriber of the sum represented by the scrip certificate, the vendor of the same to the Plaintiff, is not a necessary party to a suit, inasmuch as the contract between such original subscriber and the Company gave the former the right to assign his interest and be discharged, and such interest was duly assigned by him to the Plaintiff, and the Plaintiff was accepted by the Company in his stead.

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a proprietor of scrip, on behalf of himself and other proprietors of scrip certificates for perpetual 6l. per cent. stock, 1849, in the *Eastern Union Railway Company*; and also as owner of some of such perpetual stock, on behalf of himself and other owners of such stock; and it prays, amongst other things, to restrain the Company and those individuals who are named, being directors of the Company, from employing any money which has been subscribed by the Plaintiff and the other holders of the scrip, towards the carrying on of a railway to *Colchester*, or otherwise than in the prosecution of the works for which that money was subscribed. The bill is founded, no doubt, upon that equity which I lately considered as properly applied by the *Master of the Rolls* in the case of *The Direct London and Portsmouth Railway* (a), where a Company having obtained an Act of Parliament, and having also obtained subscriptions, and procured advances of money for the purpose of carrying a railway from *Epsom* to *Portsmouth*, afterward, finding out that they could not effect that object, or thinking it not advisable to carry on the whole of the line, proposed to make that portion only of the line which was between *Epsom* and *Leatherhead*. It appeared that they had abandoned the further portion of the line, and that, therefore, there was no intention of carrying on the railway as projected, to *Portsmouth* from *Epsom*, but that they thought it convenient and advisable, and for the benefit of the Company, to continue it from *Epsom* to *Leatherhead* only, being a portion of the line. The *Master of the Rolls* thought it was a departure from the purpose for which the subscriptions were made, and that the Company were not at liberty so to apply the money raised for the purpose of making the railway the whole of the distance. That case came before me, and I also was of that opinion. There the portion of the line proposed to be made was part of the

(a) *Cohen v. Wilkinson*, 1 Hall & T. 554.

line which would have been to be made if the whole scheme had been carried into effect. The *Master of the Rolls'* injunction was very carefully framed for the purpose of not interfering with that which would have made the works projected, legitimate. He restrained them from carrying on the works or making the railway between *Epsom* and *Leatherhead*, otherwise than for the purpose of effecting the whole scheme; and they having abandoned the whole scheme, of course it operated as an injunction against carrying on the works which they intended to complete. But the mode in which the injunction was framed marked the principle on which it was granted, viz. that although it was part of the work, yet, not being prosecuted for the purpose of effecting the whole, the Company ought not to be permitted to go on with it.

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The case made by this bill is this:—That whereas a previously existing Railway Company thought it desirable to construct two branch railways connected with their own, or rather, to purchase one and make the other, two Acts were passed authorising this Company to raise money for the purpose of purchasing the branch to *Hadleigh*, and constructing a new and distinct branch from a junction with the former railway, the *Eastern Counties Railway*, to *Harwich*; 100,000*l.* were to be raised for the one object, and 200,000*l.* for the other. These two Acts having passed, authorised the raising of the money for effecting these two schemes; but the directors, or the Company whose agents the officers and directors are, having determined not to carry both of them into operation, are applying the money so subscribed to the purpose of carrying on another portion of the original railway, and completing it to *Colchester*. That undoubtedly raised the same question as the case to which I have referred; and if the facts stated in the bill are sufficient for that purpose, they will bring it within the principle of that case, inasmuch as it will shew

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that money has been raised by the Plaintiff, and those who are represented by the Plaintiff, for one purpose, which the Company are intending to apply to another. It is impossible, if there are allegations in the bill sufficient to bring it within that principle, to say that this bill is not maintainable, on the same principle on which I was of opinion the bill in the former case was maintainable.

It appears to me, upon reading this bill, that it does most distinctly bring the case within the principle to which I have referred. Of course the facts may be all fictitious. There may be nothing in the case made by the bill; but upon the case, as the bill represents it, it appears to me to be very distinct that this money was raised for the purpose of particular works; and those particular works are alleged to have been entirely abandoned; and the money raised under those two Acts of Parliament is intended and proposed to be applied for carrying out works totally foreign to the purpose of those who subscribed the money under the provisions of those two Acts. It is in vain to speculate on the motives which parties might have had in advancing their money. It may be that the Plaintiff here had an independent private reason for promoting a railway to *Harwich*. It may be that those who subscribed the 100,000*l.* and the 200,000*l.*, which two sums are united, may have had some reason for promoting the purchase of the railway to *Hadleigh* by the *Eastern Union Railway Company*. It is impossible to speculate upon that. Every man acts, of course, according to his own view of his own interest and wishes, and the question is, whether the law will permit money which has been advanced for one purpose, to be applied, contrary to the wish of the owner of that money, to another object, and whether the bill states such a case as brings it within that principle.

The bill sets forth so much of the earlier Acts as is ne-

cessary, which it is not requisite for me to state. There are several Acts constituting the *Eastern Union Railway Company* as it existed at the time those two Acts of the year 1847 were passed. The first stated in the bill is the *Harwich Act*. It recites, that "it would be attended with public advantage if a railway were made from the line of the *Eastern Union Railway*, in the parish of *Lawford*, in the county of *Essex*, to the port of *Harwich*, in the said county, with two small branch railways therefrom; and also if a pier or jetty were made at the latter place." And then, amongst other things, it was enacted, that "it should be lawful for the *Eastern Union Railway Company* to raise, for the purposes of that Act, in addition to the capital which they were authorised to raise, under certain other Acts recited in that Act, or any of them, and in addition to any other sum which they might be authorised to raise by any Act to be passed in the then present session of Parliament, any further sum of money, not exceeding in the whole the sum of 200,000*l.*; and that the capital thereby authorised to be raised should be considered as a part of the general capital of the Company, and should be subject to the same provisions in all respects, whether with reference to the payment of calls, or the forfeiture of shares on non-payment of calls, or otherwise, as if it had been part of the original capital, except as to the amount of such shares and the times of making calls thereon, and the amount of such calls; and that it should not be lawful for the said Company, out of any money by that Act or any other Act relating to the said Railway Company, authorised to be raised for the purposes of such Act or Acts, to pay or deposit any sum of money which, by any standing Order of either House of Parliament then in force, or thereafter to be in force, might be required to be deposited in respect of any application to Parliament for the purpose of obtaining an Act authorising the said Company to construct any other railway." Now, this has been observed upon on both

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sides. It is said this makes the capital so to be raised part of the capital of the whole Company; but that is not the question; because, although it may, for certain purposes, be described and considered as part of the capital of the whole Company, the question is, whether it was not raised for a special purpose, and therefore to be applied to that special and particular purpose, or whether it was intended to be left to the discretion of the directors to apply this, in common with the original capital, for purposes not contemplated by the Act, and for purposes which were not intended to be provided for by the Act. I consider that the meaning of this enactment is, that there should be a sum of money raised for the purpose of the Act, which was to make a railway to join the *Eastern Union Railway*, from thence to *Harwich*; and it is declared to be made part of the capital of the Company, not with reference to the mode in which it has to be applied, but only as regards all the powers and mode of dealing with the property in the hands of the directors, which are prescribed by former Acts. It is to be considered as part of the capital of the Company, for the purpose of incorporating within this Act all the provisions and regulations which are comprised in the former Acts. The mode in which the Company are to deal with the money coming to their hands is prescribed. The Act says, in terms, that "it shall be part of the capital of the Company, and subject to the same provisions, in all respects, whether with reference to the payment of calls, or the forfeiture of shares on the non-payment of calls, or otherwise, as if it had been part of the original capital;" that is to say, all the provisions found in the former Act, regulating the original capital, are to be applicable to the Company in dealing with those additional shares; but then comes this provision, which is also very strong, to shew that there was no intention of amalgamating this, as capital, with the original capital; for it provides, that it shall not be lawful for the directors to make use of this money for any other

Act for the purpose of deposits to meet the parliamentary rule as to promoting any other bill: if it is money entirely at their disposal, that would be altogether unnecessary; but the Act keeps it untouched and unaffected by any purpose which the Company might have of using it, with a view to make a deposit, keeping it, therefore, strictly for the purposes to which the Act refers.

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Then comes the *Hadleigh* Act, which is very much the same. I observe that the *Vice-Chancellor* relies principally on the *Hadleigh* Act, and not so much upon the *Harwich* Act. I am not very well aware why that is. It seems to me they are both very much open to the same observation. The bill states, as to the *Hadleigh* Act, "that, under and by virtue of another Act of Parliament, of the 10 & 11 Vict., intituled, 'An Act for authorising the sale of the *Eastern Union and Hadleigh Junction Railway* to the *Eastern Union Railway Company*,'—the short title of which Act is *The Eastern Union and Hadleigh Junction Sale Act, 1847*,—the *Eastern Union and Hadleigh Junction Railway Company* were empowered to sell,"—(this is a previously existing Act, —it was a purchase, and not a power to make a purchase,) —"the *Eastern Union and Hadleigh Junction Railway Company* were empowered to sell, and the said *Eastern Union Railway Company* were empowered to purchase, the undertaking authorised by the *Eastern Union and Hadleigh Junction Railway Act, 1846*; and, for the purpose of the purchase and execution of the said *Eastern Union and Hadleigh Junction Railway*, the said *Eastern Union Railway Company* were authorised to create such an additional number of shares, and to borrow such sum of money, as might be necessary for completing such purchase, or for constructing and working the said undertaking, provided the amount to be raised should not exceed the sum of 100,000*l*." That is, in fact, all that is stated in the bill, material upon the subject. The *Harwich* Act is stated more at length in the



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bill than the *Hadleigh* Act, but they both come to the same thing. In the case of the *Hadleigh* Act, 100,000*l.* are to be raised by additional shares, for the purchase of the *Hadleigh* undertaking; and in the other, 200,000*l.* are to be raised for the purpose of making the branch to *Harwich*; but in both there was a specific purpose entertained, and that purpose was to be met and accomplished by means of the additional stock to be created under the authority of each of those Acts.

Then comes that which is, undoubtedly, not immaterial, —a statement of the report and the resolutions which led to the issuing of the certificates. The report of August, 1847, is stated as being favourable to this scheme, and the resolution is, "That, for the purpose of constructing the branch line from *Manningtree* to *Harwich*, and for purchasing the *Hadleigh Railway*, under the two Acts passed in the last session of Parliament, the directors be authorised to raise, between the date hereof and the 1st of January, 1849, the sums of 200,000*l.* and 100,000*l.*, and to grant scrip receipts for such amount as may from time to time be paid up in respect of such sums, until each subscriber of 20*l.* and upwards shall have paid the amount he may subscribe, in full; and such scrip receipts shall entitle the holder thereof, on the 1st of January, 1849, to become a registered shareholder in a new Eastern Union Stock, for the amount he has subscribed and paid up, upon which he shall receive a guaranteed dividend of 6*l.* per cent. per annum, in perpetuity, and have the option, at the end of any six months, within five years, of converting his guaranteed stock into the general stock of the Company."

Now, it is impossible to say, after this, that these stocks are all united and mixed up in one form. They are as distinct in point of amount, of interest payable, and of security, as they possibly can be; they are raised specifically

for the purposes of those two Acts: they bear a different rate of interest, 6l. per cent., and they are guaranteed by the other fund. They have, therefore, a preference over the holders of the other fund, and, in a particular event, they are to fall into the original stock. That, of itself, would be quite sufficient to show that they were never considered as being identical with, or part of the original stock. They are perfectly distinct; and this resolution is not only important, as constituting part of the contract, but undoubtedly it is a representation operating upon the minds of the parties advancing the money, telling them for what purposes the money was to be raised, and in what manner it was to be secured, and what was to be the amount of the benefit to arise from the subscriptions which they were to make. There was a long speech made by the chairman, not material to be taken into consideration now, and there is a resolution of the Company, which would be the body to deal with the public, inviting it to come forward. It is, no doubt, a representation which is binding as between the Company itself, and those who might advance the money to them. Then the bill states, "That, in pursuance of the said resolution, the whole of the said 300,000l. was soon subscribed for, and that all the calls thereon had been paid previously to the 2nd of June, 1848, except 85,500l., which would fall due and ought to be paid on or before the 30th day of December, 1848."

Then the bill states, "That the persons who so subscribed, did so, confiding in the said resolutions, and in the representations of the said *John Chevallier Cobbold*, and of the other directors, as to the purposes for which the said perpetual 6l. per cent. stock was to be created, and not supposing that the money to be raised thereby would be applied to any other purposes than those connected with the construction of the said line to *Harwich*, and the purchase of the said line from *Hadleigh*." Then the bill states the

1850.  
BAGSHAW  
v.  
THE EASTERN  
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WAY CO.  
Judgment.

1850.  
 BAGSHAW  
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 WAY CO.  
 Judgment.

certificate which describes the shares: "The Scrip for the Eastern Union. Perpetual 6½ per cent. Stock, 1849." It then recites all the Acts, which it must necessarily do, because those particular Acts refer to the former Acts, as containing the directions and provisions which were to be adopted with regard to this newly created stock. It also, of course, recites the Acts of 1847, under which those new works were to be carried on. The bill then states, that the Plaintiff, having become a purchaser of two scrip certificates of 500l. each, left his certificates for the purpose of being registered; and he says that they ought to have been, although they had not been, registered; but, having been left for the purpose of being registered, it was the duty of the Company to act upon those instructions. Then comes the allegation in the bill, upon which the equity turns, viz. "That, from other inquiries which he has since instituted, he has discovered, as the fact is, that the directors of the *Eastern Union Railway Company* have resolved not to proceed with the construction of the said railway from *Manningtree* to *Harwich*; and, as evidence thereof"—Then he states evidence, which may or may not be applicable; but the allegation in the bill, which must be taken to be true for the present, is, "that he has discovered, as the fact is," not that he has received testimony which leads him to believe it is so, but that he has discovered that the fact is so and so. It is a distinct allegation, therefore, and the Defendants, in demurring, admit the fact that the directors have resolved not to carry into effect that railway from the junction to *Harwich*.

It then states, "That a majority of the directors of the said Company have a strong personal interest distinct from the interest of the said Company, in completing the *Eastern Union Railway* to the city of *Norwich*, and are totally indifferent about the completion of the line to *Harwich*; and that, finding themselves unable to raise sufficient capi-

tal for both purposes, they have determined to misapply, and have already to a great extent misapplied, the money raised under the said *Eastern Union and Harwich Railway and Pier Act*, 1847, and under the said *Eastern Union and Hadleigh Junction Sale Act*, 1847, by employing the same in constructing an extension line to *Norwich*, and for other purposes not authorised by the said Acts or either of them."

1850.  
BAGSHAW  
v.  
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UNION RAIL-  
WAY CO.  
Judgment.

Then the bill states, "That such application is not only contrary to the directions of the said Acts of Parliament, but is also contrary to the said resolution passed at the said meeting on the 21st day of August, 1847; and that it is not within the powers of the said Corporation or Company, or of any majority of the members thereof, to authorise or sanction such application."

Then the bill states, "That the said directors of the said *Eastern Union Railway Company* have already received 214,500*l.*, or thereabouts, under the powers of the two last-mentioned Acts; and that they have misapplied the said money by employing it on works to which the same is not authorised to be applied by the said Acts or either of them; and that, unless restrained by the order and injunction of this honourable Court, they will in like manner misapply the said sum of 85,500*l.*, which is to be received, as hereinbefore mentioned, on the 30th day of December instant."

Now that contains all the allegations of title, and all the allegations of the misapplication of the monies upon which the question upon this demurrer depends. No doubt the first question is upon the construction of the Acts; because, if the bill be wrong on the construction of the Acts, then the allegations would not be material. Being clearly of

1880.  
BAGSHAW  
v.  
THE EASTERN  
UNION RAIL-  
WAY Co.  
*Judgment.*

opinion that those who subscribed for these purposes have a right to have their money applied to the purposes held out to them, not only by those Acts, but by the resolutions of the Company stating the purposes for which their money was to be applied, and having, upon the authority of the case to which I have before referred, no doubt that the parties have the right which this Court will enforce, and finding the positive allegation that the Company not only intend to misapply the money,—apply it for other purposes,—but that they have actually done so, and intend to persevere,—I must hold, on the authority of that case to which I have before referred, that the party whose money has been so misapplied, and is intended to be hereafter so misapplied, is entitled in equity to the interposition of this Court, for the purpose of restricting the Company, in the application of his money, to those purposes for which it was said it was to be advanced.

That disposes of the principal grounds upon which the demurrer rests. With respect to the other objections which are raised to the bill, it appears on the facts, that there is no foundation for them. It is true this Plaintiff is a shareholder, and is a member of the Company, and he is the holder of this particular scrip. He and those who have advanced the money which formed that particular stock, being the holders of the scrip upon which it is secured, have an interest totally unconnected with the general purposes of the Company; and that is the very ground of his equity. He says, “It is true I am a member of this Company, but I am also a holder of this scrip; and as holder of this scrip, I have an equity and a right, independently of the general purposes for which you the directors are carrying on this concern. If I had no scrip, I should be merely a member of the Company; but, having that scrip, I file my bill as the proprietor of that scrip.” His right is entirely untouched by any of the cases which have been referred to, and the

case gives to that description of persons who are represented by the Plaintiff, and to the Plaintiff himself, a *locus standi*, as a Plaintiff in this Court, to see to the application of that money as to which he holds scrip, as a proprietor, quite unconnected with and independent of any objection which might arise as to his being a member of the Company.

1850.  
BAGSHAW  
v.  
THE EASTERN  
UNION RAIL-  
WAY CO.  
Judgment.

Then, with respect to the other objections,—I am not going through them all; it is not necessary for me to do so. It is said that the Plaintiff is only holder of the scrip, and, as holder of the scrip, he was not the party with whom the contract was originally made. The party who holds the scrip is the party to whom the Company looks,—not merely the original contractor, but the party who holds the scrip. It is a marketable and transferrable security, and whoever holds it is invested with all the rights of the original party who signed the scrip. He purchases it with certain rights attaching to that species of property, and this is one of those rights, which he is endeavouring to assert.

I do not think, therefore, there is any objection, in point of form, to the shape in which this bill is framed; and, upon the general equity, it falls within the principle to which I have referred; and therefore, I think the judgment of the *Vice-Chancellor* is correct, and this appeal must be dismissed, with costs.

1849.

Dec. 18th &  
20th.

In the case of a bill filed to set aside the sale of a reversionary interest in a freehold estate, dependant on the tenant for life dying without issue, he being at the time of the sale in his 57th year, and his wife in her 54th year, and there never having been any issue of the marriage except a still-born child, many years previously to the time of the sale, a reference was directed to the Master to ascertain the value of the reversionary interest at the time of the sale.

Statement.

## BOOTHBY v. BOOTHBY.

THE bill sought to set aside an indenture of release of the 7th June, 1843, whereby a contingent reversionary interest in a freehold cottage and lands was conveyed by *William Boothby* to his brother *Christopher Boothby*. The interest was derived from the will of *W. Boothby*, the grandfather of three of the Plaintiffs, and was to arise on the death of *C. Boothby*, the brother of *W. Boothby*, without issue, and the consideration for the conveyance was a sum of 20*l*. At the date of the conveyance *C. Boothby* was in the 57th year of his age, and his wife in her 54th year, and they had had one child only, which was still-born, about twelve years previously. *W. Boothby* was at that time sixty years of age, and had for some years been in the receipt of parochial relief. *C. Boothby* died on the 10th of April, 1844, leaving his wife his sole and universal devisee, legatee, and executrix. *W. Boothby* died on the 24th of August, 1844, leaving the Plaintiffs his sole devisees. The bill charged, that the consideration money paid was greatly below the value of the premises sold, and also that the conveyance was obtained by fraud, and at a time when *W. Boothby* was incapable of understanding what he was about.

One point that arose in the course of the argument was, whether, according to the true construction of the will of *W. Boothby* the grandfather, the legacies given thereby were charged on the purchased premises in aid only or in absolute exoneration of the testator's personal estate. It was admitted by the Defendant in her answer, that *W. Boothby* executed the conveyance without having any professional adviser on his behalf; and it was also stated by her answer, that the unincumbered fee simple of the premises, not including the amount of legacies alleged by her to be absolutely charged thereon, was, at the date of the conveyance, of the

value of 700*l.*, but that such value had been in great part created by an outlay on the premises by *C. Boothby*, in the erection of four dwelling houses. The Defendant in her answer insisted that the interest of *W. Boothby*, the Plaintiffs' father, was incapable of valuation. One of the Plaintiffs' witnesses, an accountant, deposed to the market value of the premises at the date of the conveyance being 335*l.*, if *W. Boothby's* interest were considered in the nature of an absolute and not a contingent reversionary interest.

1849.  
 BOOTHBY  
 v.  
 BOOTHBY.  
 Statement.

At the hearing, before the *Vice-Chancellor of England*, the bill was dismissed with costs, and from that decision the Plaintiffs appealed.

The LORD CHANCELLOR having expressed his opinion at the close of the argument, that the Plaintiffs' charge of fraud had failed, very slight notice only is taken in the report, of the observations of Counsel or the evidence on that part of the case.

Mr. *Lloyd* and Mr. *Nalder*, in support of the appeal, contended, that the consideration for the purchase, viz. 20*l.* (there being no other consideration, either averred in the answer or attempted to be proved by the Defendant), was grossly under the value of the premises, and that that fact appeared from the evidence adduced for the Plaintiffs, no evidence having been entered into on that point on behalf of the Defendant; that *Barnardiston v. Lingood* (a), *Bowes v. Heaps* (b), and *Davies v. Cooper* (c), were authorities strongly in favour of the Plaintiffs' case; that, in *Baker v. Bent* (d), which would probably be relied upon on behalf of the Defendant, the parties to the transaction had set an

Argument.

(a) 2 Atk. 133.

(b) 3 V. & B. 117.

(c) 5 My. & Cr. 270.

(d) 1 Russ. & My. 224.



1849.  
 BOOTHBY  
 v.  
 BOOTHBY.  
 —  
*Argument.*

actual value on the particular contingency that existed there; that *C. Boothby* was substantially a purchaser of an absolute interest in reversion, dependant simply on his own life estate; and that the circumstance of the great inadequacy of the price paid for the property might be fairly taken into consideration by the Court, in connexion with *W. Boothby's* ignorance of his rights, his situation in the world, (he being a mere marksman, and unable to sign his name,) and the undue influence that had been exercised over him by his brother *C. Boothby* and his connexions, as appeared from the evidence in the cause.

[The LORD CHANCELLOR observed, that the statement of the *Master of the Rolls*, in the case of *Baker v. Bent* (a), could not have been intended by him to be, nor could it be, received as a general proposition.]

*Gowland v. De Faria* (b), and *Lord Aldborough v. Trye* (c), were also referred to by Counsel on behalf of the Plaintiffs.

Mr. *James Parker* and Mr. *Elmsley*, for the Respondent, contended that the point of under-value was only a subordinate part of the Plaintiffs' case, and that the appeal ought to be decided on the question of fraud, which was so prominently put forward by the bill, and on which so much inconclusive and unsatisfactory evidence had been adduced on the part of the Plaintiffs; that the Defendant's answer contained a true statement of all the material facts of the case, the same being within her own personal knowledge; that the reversionary interest in the present case was incapable of being valued; that, in *Gowland v. De Faria* (b), as in the present case, the evidence had reference only to tabular value; that the case of *Gowland v. De Faria*

(a) 1 Russ. & My. 224.

(b) 17 Ves. 20.

(c) 7 C. & F. 437.

was disapproved of by Chief Baron *Alexander*, in *Headen v. Rosher*(a); and that, whether the true construction of the will of the testator *W. Boothby* was, that the legacies given by his will were charged primarily on the devised real estate, or only thereon in aid of the personal estate, (the fair inference being that there was no personal estate,) the consideration actually paid was not an inadequate one.

1849.  
 BOOTHBY  
 v.  
 BOOTHBY.  
 —  
*Argument.*

[The other cases referred to, on behalf of the Respondent, were *Twisleton v. Griffith*(b), *Peacock v. Evans*(c), *Bonner v. Bonner*(d), and *Small v. Attwood*(e).]

Mr. *Lloyd*, in the course of his reply, having stated the willingness of the Plaintiffs to take an inquiry as to the value of the reversionary interest,

The LORD CHANCELLOR said, he considered that the Plaintiffs' case, as put forward on the ground of fraud, had failed; that he had only to consider the charge, alleged by the Plaintiffs, of under-value; that, as imperfect evidence only had been adduced on that point on the part of the Plaintiffs, and no evidence at all had been given thereon on the part of the Defendant, he should direct a reference to the Master, to inquire and state the value of the reversionary interest in question at the date of the sale, such inquiry to be in the same terms as the reference in *Lord Aldborough v. Trye*. And his Lordship ordered so much of the bill as had reference to the charge of fraud to be dismissed with costs; the payment of such costs, however, being reserved until the Master should have made his report, in pursuance of the reference directed to him as to the value of the reversionary interest.

*Judgment.*

(a) M'Cl. & Y. 89.

(b) 1 P. Wms. 3010.

(c) 16 Ves. 512.

(d) 13 Ves. 379.

(e) Younge, 407..

1850.

Jan 26th.

## SERGROVE v. MAYHEW.

After bill filed for an account, and appearance entered by two of the Defendants, who were in partnership as solicitors, one of them took the benefit of the Insolvent Debtors Acts, and the provisional assignee of the Insolvent Debtors Court was, by order of that Court, appointed the official assignee of his estate and effects. Plea filed to the bill, stating that fact, and that the provisional assignee ought to be made a party to the suit, was allowed.

THE bill was filed on the 21st of February, 1849, against *Mayhew & Reynolds*, carrying on business as attornies and solicitors in copartnership, and *Robert Southee*, and prayed an account and injunction against *Mayhew & Reynolds* as such partners. After the Defendants had appeared to the bill, the Defendant *Mayhew* filed his plea to the bill, stating an order of the Insolvent Debtors Court, pronounced on the 17th of March, 1849, whereby *Samuel Sturgis*, the provisional assignee of that Court, was appointed the official assignee of the estate and effects of the Defendant *Reynolds*; that all the estate and effects of *Reynolds* was vested in *S. Sturgis*, and that he ought to be made a party to the suit. On the 10th November, 1849, the *Vice-Chancellor of England* overruled the plea, but gave the Defendant *Mayhew* two months' time to answer. From his Honor's order the Defendant *Mayhew* appealed.

*Argument.*

Mr. *Rolt* and Mr. *Glasse*, in support of the appeal, contended that the Defendant had a right to plead a fact happening after the institution of the suit, which would get rid of the suit, and render an answer unnecessary; and they cited *Turner v. Robinson* (a) and *Tarleton v. Hornby* (b).

Mr. *Malins* and Mr. *Chichester*, for the bill, contended that the Defendant's plea amounted in reality to an objection that the Plaintiff had not filed a supplemental bill to bring the proper parties before the Court, which was an objection to be taken at the hearing of the suit; that both the Defendants *Mayhew* and *Reynolds* had appeared, and if

(a) 1 S. &amp; S. 3.

(b) 1 Y. &amp; C. 333.

the present plea were allowed, it would be in the power of any Defendant to say he would not answer, and thus the suit could not be brought to a hearing.

Mr. *Rolt* was not heard in reply.

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 SERGROVE  
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 Argument.

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The LORD CHANCELLOR observed, that the present case was similar in principle to that of a release executed by a Defendant after bill filed, and that the cases cited shewed the present to be the legitimate course of proceeding; that a Defendant might bring forward any fact that incapacitated the Plaintiff from effectually proceeding in the suit, and if it were shewn that the suit was defective, it was no objection that the incapacity to proceed arose from an event occurring subsequently to the filing of the bill.

*Judgment.*

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The order made in the Court below was discharged, and the usual order made as in the case of a plea allowed, with liberty for the Plaintiff to file a supplemental bill.

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1850.

Feb. 12th.

*In re* ROBERT BISHOP.

In the case of a fiat issued previously to the Stat. 12 & 13 Vict. c. 106, and in which the proceedings had not been completed, the *Lord Chancellor* ordered the petitioning creditor's affidavit, and the petition for the fiat, to be produced for the purpose of being inrolled and sealed, with a view to their production on the trial of an action, in which the validity of the fiat was to be decided.

**MR. BAGSHAWE** applied for an order that the Secretary of his Lordship might be directed to attend the Court of Bankruptcy in Basinghall-street, with the petitioning creditor's affidavit and petition seeking the fiat in this matter, and permit the same to be inrolled and sealed. An action had been commenced and was to be immediately tried in the Court of Queen's Bench, in which the validity of the fiat was to be decided, and Counsel had advised that it would not be safe for the Defendants to proceed to a trial without having the petitioning creditor's affidavit and the petition for the fiat inrolled and sealed, in Court.

The 4th and 236th sections of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), were referred to.

*Judgment.*

The LORD CHANCELLOR made the order, on the ground that the fiat had issued previously to the passing of that Act, and that the proceedings had not been completed therein, and were still pending (a).

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(a) Vide *In re Harwood*, 1 Hall & T. 572.

1850.

*In re* THE ST. GEORGE'S STEAM-PACKET COMPANY, *Ex parte* DOYLE.

Feb. 23rd.

THE Master in this case had placed *William Doyle* and *James Doyle*, who were the executors of *John Doyle*, deceased, in the list of contributories, as personally responsible in respect of six shares in the Company which belonged to them in their representative capacity only, as appeared from the books of the Company. *W. Doyle*, as one of such executors, with the assent of his co-executor, received the dividends on those shares and applied them to the discharge of the claims against the testator's estate.

By a Company's deed it was provided, that every person who, being the executor of any deceased proprietor, should not, at the time of the shares vesting in him in such capacity, be a recognised proprietor in respect of any other shares, should, as to all duties, obligations, &c., upon or against him in respect of such shares, become a proprietor from the time of the shares becoming so vested in him; but, as to profits, &c. no such person should be considered a proprietor in respect of the same until he should have executed or acceded to the deed:—*Held*, that the receipt of dividends by the executor of a deceased proprietor did not create any personal liability in the executor.

By the 16th clause of the Company's deed, it was declared, that no benefit of survivorship should take place between the shareholders, so that shares of a deceased shareholder vested in his executor. The 17th, 18th, and 19th clauses regulated the mode of transfer by such executor, and provided for contingencies of loss of certificates; and the 20th clause declared, as regarded an executor, that, before he should transfer shares, or become a proprietor, or receive dividends in respect of such shares, he should leave for inspection, at the office of the Company, the probate of the will under which he should claim to be entitled to the shares. The 21st clause declared, that every person who, being the executor, administrator, or legatee of any deceased proprietor, should not, at the time of the shares vesting in him in such capacity, by the means aforesaid, be a recognised proprietor in the Company in respect of any other shares in the capital, should, as to all duties, obligations, claims, and demands, upon or against him in respect of such shares, be considered a proprietor in the Company from the time of the shares becoming so vested in him as aforesaid; but as to all profits, rights, privileges, benefits, and advantages, to arise from the same shares, no such

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 THE  
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person should be considered a proprietor in respect of the same, until he should have executed or otherwise acceded to the deed.

On application to Vice-Chancellor *Knight Bruce*, his Honor ordered, that the names of *William Doyle* and *James Doyle* should be included in the list of contributories in respect of the six shares, as the executors of *John Doyle*, deceased, and not as personally responsible.

From that order the official managers of the Company appealed.

*Argument.* Mr. *Bacon* and Mr. *Prior*, appeared in support of the appeal.

The executors having complied with the requisition enacted in the 20th clause, they became recognised proprietors, and the receipt of dividends in respect of the six shares was an act of accession under the 21st clause.

[The LORD CHANCELLOR.—You must shew very distinct terms in the deed, to make an executor personally liable merely because he has received dividends due in respect of shares of his testator.]

In none of the cases that have come before this Court has there been found a clause like the 21st of this Company's deed: the words "*claims and demands*," mentioned in that clause, have reference to the demands on the testator's estate; and if an executor chooses to become an ordinary partner in the concern, he may take on himself its responsibility at any time, by some deed of accession, such as the receipt of dividends due on the six shares, or the like.

The LORD CHANCELLOR:—

What is alleged to have been done by the executor does not make him personally responsible: he has not executed the deed, he has not acceded to the deed, otherwise than can be inferred from the fact of receiving the dividends; he has not acted in his own name, not assumed any personal right, nor interfered at all with the Company; and he has signed a receipt as representative of his deceased brother only, and the Company thought fit to receive him in that character; he has not received the dividends as a shareholder. Then the question is, whether, doing that, and nothing more, the personal representative is to become liable for all the debts of his testator. [Here his Lordship read the 21st clause of the deed.] Now, what are the “demands” against the personal representative? Not a personal demand. You cannot say that any demand arising out of the property of the testator is a demand against the executor, otherwise than in his representative character. Here the Company have dealt with him in his representative character. He has asserted no right, nor has he done anything, except as a representative, and in the character of a representative. Well, then, the demands against him as a representative are perfectly clear.

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—  
*Judgment.*

Mr. Rolt (with whom was Mr. Selwyn), for the Respondents, then urged that the appeal must be dismissed, with costs; and added, that his Lordship perhaps would determine whether the official managers ought to have their costs out of the estate. In *In re The Direct London and Exeter Railway Company, Ex parte Hollingsworth*(a), the costs were ordered to be paid by the official manager, without prejudice to his having the costs out of the estate. It was also submitted, that this case was one in which the costs

(a) 1 Hall & T. 592.



1850.

*In re*  
**THE**  
**ST. GEORGE'S**  
**STEAM PACKET**  
**Co.**  
*Ex parte*  
**DOYLE.**

*Judgment.*

ought to be paid by the official managers in the proper and regular way.

The LORD CHANCELLOR, however, said, that the case was a *bond fide* one, and that the Court never granted what was asked by the Respondents as to costs, except upon wilful misconduct.

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The motion was accordingly simply refused, with costs.

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Jan. 29th,  
 30th, & 31st.

## COWELL v. WATTS.

In the month of May, 1843, a parol agreement was entered into between A. and B. for a partnership between them, as to certain land intended to be used for building purposes, and a lease of it was afterwards executed by the lessor to B. only, the lessor declining to grant a lease to two persons. Certain acts of ownership were exercised by A. shortly after the agreement was entered into; but, afterwards, A. permitted B.

to lay out his money in the erection of buildings on the land, without interfering therewith. After a lapse of eighteen months, A.'s solicitor applied to B. to perform the agreement, which B. repudiated; six months afterwards, A. filed his bill against B., seeking specific performance of the agreement:—*Held*, that the circumstances were such as to exclude A. from insisting on the specific performance of the agreement by B.; but, in the order dismissing the bill with costs, directions were given to the Master to disallow the Defendant the costs occasioned by his setting up the Statute of Frauds, and disputing the parol agreement and part performance thereof.

THE original bill in this case was filed on the 21st of August, 1845, by *Thomas Cowell* against *Benjamin Watts* and *Benjamin Watts* the younger, and his several children; and the cross bill was filed by *B. Watts* the elder against *T. Cowell*, as the sole Defendant. The original bill sought the specific performance of a parol agreement entered into between the Plaintiff and the Defendant *Watts* the elder, in the spring of 1843, to share the profits and loss in a joint undertaking, to take certain ground at a place called the *Grange*, at *Brompton*, in the county of *Middlesex*, for the purpose of preparing the same for building, and letting the same on improved ground-rents upon building leases. By the decree of Vice-Chancellor *Knight Bruce*, made on the hearing of the causes, dated the 30th of January, 1849, it was ordered, that the original bill should stand dismissed, with costs, except so far as such costs had been increased by the

Defendants, or any of them, setting up the Statute of Frauds, and disputing the fact of the parol agreement in the pleadings mentioned, or that the same was in part performed. And a reference was directed to the Taxing Master, to tax the costs of the Defendants accordingly; and in such taxation, the Master was to look into the evidence, and to disallow the costs of so much thereof as he should consider to have been unnecessarily entered into. And it was also ordered, that the costs of the Defendants, except so much thereof as should be so disallowed by the Master, should be paid by the Plaintiff *T. Cowell* to the Defendants. And it was ordered, that the cross bill should be also dismissed out of Court; but no costs of that suit were given on either side.

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 }  
 COWELL  
 v.  
 WATTS.  
 —  
*Statement.*

Shortly previously to the month of May, 1843, *James Bonnin* agreed with the trustees of *Smith's Charity* to take from them, for building purposes, a lease of certain meadow land and tenements standing thereon, for the term of eighty-four years, to be computed from the 24th of June, 1843; such buildings to be completed by the 25th of October, 1848. The Plaintiff *T. Cowell* and the Defendant *B. Watts* agreed, through the medium of *B. Watts*, with *J. Bonnin* (*Bonnin* preferring to have one rather than two tenants or lessees), to take from *Bonnin*, on certain terms, such part of the land as he should not have occasion for. A meeting was held on the 17th of May, 1843, between *B. Watts*, on behalf of himself and *Cowell*, and *Bonnin*, when an agreement of that date was entered into, and signed by *B. Watts* and *Bonnin*, for the lease of a portion of the land to *B. Watts*, as soon as the lease of the whole of the land should have been granted to *Bonnin* by the trustees of *Smith's Charity*. Previously, however, to that agreement being entered into, *Bonnin* required a deposit of 100*l.*, as a security for the due execution by *B. Watts* of the last-mentioned agreement; but *B. Watts*, not having

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that sum at his command, *Bonnin* signed a promissory note for that amount, payable to the order of *B. Watts*, six months after date, which, at the request of *B. Watts*, was immediately discounted by *Cowell*, who gave *B. Watts* the sum of 100*l.*, less the amount of discount thereon, at the rate of 5*l.* per cent. per annum, which was immediately afterwards paid to *Bonnin*; and thereupon *B. Watts* signed and gave to *Cowell* the following I. O. U., viz. "I. O. U. the half of the 100*l.* now advanced for Mr. *Bonnin*. May 17, 1843. *Benjamin Watts*." The Defendant *B. Watts* the younger and his children were made Defendants to the original bill, in respect of an angular piece of ground, to which they claimed title, and which *Cowell* insisted was part of the land agreed to be leased by *Bonnin* to *B. Watts* for the benefit of *B. Watts* and *Cowell*, as aforesaid. The arrangement between *Bonnin* and the trustees of *Smith's* Charity for the lease was completed in the month of July, 1843. Articles of agreement, dated respectively the 19th and 24th of August, 1843, were afterwards executed by *Bonnin* and *B. Watts* for the lease to *Watts* of a portion, previously agreed for, of the land leased to *Bonnin* by the trustees of *Smith's* Charity. The evidence of several persons was in favour of the existence of the partnership between *Cowell* and *B. Watts*; and evidence was also adduced on behalf of the Plaintiff, of the recognition by the Defendant *B. Watts* of his interest in the land, by the sending of portions of the produce of the land to *Cowell*, and *Cowell's* use of the stables, and grass growing on the land for some months before the erection of the new houses on the land by *Watts*. In July, 1843, however, the Plaintiff's cattle were removed from the land in question, on which they were feeding, by the Defendant's orders. The Defendant *B. Watts's* intention to exclude *Cowell* from the benefit of the lease granted by the trustees to *Bonnin*, was first shewn in January, 1845, when he refused to sign an agreement admitting *Watts's* claim to a share in the land. *Norris*

one of the Defendant's witnesses, deposed to a statement by *Cowell*, that he would have nothing to do with the land.

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Argument.

Mr. *Swanston* and Mr. *Metcalf*, in support of the appeal from the decision of Vice-Chancellor *Knight Bruce*, contended, that, as there had been part performance by *B. Watts* of the parol agreement, the Statute of Frauds would not be a bar to the Plaintiff's bill; that the existence of the partnership between the parties, as well as the agency, might be proved by parol, and, if so, the particulars thereof would become an essential ingredient touching the title to the land; that, as the status of 1843 must be considered as continued down to 1850, there had been no acquiescence on the part of *Cowell*; that the onus of proof was thrown on the Defendant *B. Watts*; and that, if *Cowell* had been the Defendant instead of Plaintiff, he would clearly have been bound by any loss that might have arisen in the transaction.

*Dale v. Hamilton* (a), *Coles v. Trecothick* (b), *Lamas v. Bayly* (c), *Atkins v. Rowe* (d), *Forster v. Hale* (e), and *Lake v. Craddock* (f), were referred to on the part of the Appellant.

Mr. *Russell* and Mr. *R. W. E. Forster*, for the Defendant *B. Watts*, contended, that, independently of the question arising between the parties on the Statute of Frauds, an alleged agreement must be clear and definite, which was not the case here; that the whole matter rested in anticipation, and was in a state of uncertainty, until *Bonnin* obtained the lease from the trustees in July, 1843; that no conclusive arrangement for a partnership was ever come to be-

(a) 5 Hare, 369; *S. C.*, on appeal, 2 Ph. 266.

(b) 9 Ves. 250.

(c) 2 Vern. 627.

(d) Mos. 39.

(e) 5 Ves. 308.

(f) 3 P. Wms. 168.

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tween the parties; that the evidence adduced on behalf of the Defendant proved a subsequent abandonment of any previous agreement between the parties, if such ever existed; and that the cases cited for the Plaintiff contained circumstances which distinguished them from the present.

3 Sugd. V. & P. 252—254, was cited on behalf of the Defendant *B. Watts*.

Mr. *Bacon* and Mr. *Rolt*, for the Defendant *B. Watts* the younger, and his children, contended, that the transaction which took place with reference to the 100*l* advanced to *Bonnin*, and the I. O. U., and which was prior to any agreement between *Bonnin* and *Watts*, amounted only to a loan; that *Cowell* could not have been rendered liable to *Watts* for anything connected with that transaction, even if *Watts* had not repudiated any interest in *Cowell*; and that the long interval that elapsed between the date of the agreement and the month of January, 1845, had been left wholly unaccounted for.

Mr. *Swanston*, in reply, having had his attention directed by the *Lord Chancellor* to the apparent absence of any proceedings on the part of his client between August, 1843, and January, 1845, urged that there was no evidence of the Plaintiff having omitted any duty required of him; that, where a clear agreement existed, as in the present case, much more was necessary to induce the Court not to interfere, than the fact of the Plaintiff being passive during the interval referred to by his Lordship; that it was not intended, from the first, that the Plaintiff should be an active partner; and that the Defendant *Watts* had dealt unfairly with the Plaintiff from the very commencement of the transaction.

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The LORD CHANCELLOR:—

The object of the bill is, to obtain an equal share from the Defendant of the land leased to him by *Bonnin*, who was a lessee under the trustees of *Smith's* Charity, and there was an objection by *Bonnin* to make a lease to *Cowell* and *Watts* jointly: the mere form of the lease to the one party would make no difference in the case. The Plaintiff is represented as a monied man, having other occupations, and the Defendant was to be the active partner in the transaction, the money of the one being expected to be considered a set-off against the skill of the other. It seems singular, that, upon application being made by the Plaintiff to the Defendant *Watts*, to enter into a written agreement, the latter declined to comply therewith; but after the lease of the lands was executed to the Defendant, no further application was made by the Plaintiff on the subject. There was an original agreement, no doubt, between the Plaintiff and the Defendant *Watts* the elder. The Plaintiff carrying on the business of a butcher, it is highly probable that he would turn his cattle on the land in question, even if it were the land of the Defendant; but in the month of July, 1843, orders were actually given by the Defendant to remove the Plaintiff's cattle, and they were removed, and no steps were taken by the Plaintiff to have them restored. The Defendant also mortgaged the land to raise money for the purpose of building thereon, and he afterwards expended such money, being considerable in amount, upon the land. The Plaintiff, who was the monied man, rendered the Defendant no assistance, and the fact of no application having been made to the Plaintiff by the Defendant with reference to the land, subsequently to the date of the original agreement, is consistent with the fact that the Defendant had taken on himself the whole adventure. All the parties resided in the same neighbourhood, and the Plaintiff permitted the Defendant *Watts* the elder to lay out his money without interfering

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therewith. The Plaintiff indeed lies by, for a period of eighteen months, and the land, during the whole of the time, is in the exclusive occupation of the Defendant. The Plaintiff applies through his solicitor, in the month of January, 1845, to the Defendant to perform the agreement; in February following, the Defendant declines to do so, and the Plaintiff takes no steps to compel a performance, until the month of August following. Such a course of conduct must have induced the Defendant to suppose the Plaintiff had abandoned all interest in the land, and that the Defendant had the sole right thereto. The present case is stronger against the Plaintiff than *Norway v. Rowe* (a), where the parties possessed an actual interest in the mine. They stood by a considerable time, suffering the Defendants to bear the burthen and risk of working the mine, which became productive, but their claim to have a share of the mine was refused by the Court. My opinion is, that the circumstances existing in the present case are sufficient to exclude the Plaintiff from applying to the Court to have decreed him any share of the benefit to be derived from the lease of the lands in question; and I decide the case on the grounds on which the Court below proceeded, and need not refer to the other argument urged on behalf of the Defendant. The cases cited, of an agent purchasing lands in his own name, were cases of fraud, and have no application here. In this case there would be merely a trust, but I do not decide the case on that point. The appeal will be dismissed with costs.

(a) 19 Ves. 144.

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SHALLCROSS v. WEAVER.

Jan. 17th.

IN this case the *Master of the Rolls* had made an order for the production of certain deeds and documents (a). This was a motion that the order of the *Master of the Rolls* might be discharged or varied so far as respected the several deeds, documents, abstracts, and writings in the Defendant's answer and schedule mentioned, relating to the several lots, 3, 4, and 6, of the messuages and premises in the pleadings mentioned.

By the will of *Francis Brooks*, who died in November, 1836, he devised his real estates to *Charles Wright* and *William Bishop*, in trust to sell, and pay certain legacies, but gave no directions as to the disposition of his residuary estate, which the Plaintiff claimed as his heir-at-law.

This bill was filed to take an account of the real estate, and to obtain a re-conveyance from the Defendant *Weaver* of part of the testator's estate which had been purchased by him. The real estate consisted, among other things, of a house at *Stafford*, let at a rent of 45*l.*, and another building, worth 20*l.* per annum, which were subject to a mortgage of 700*l.*, and other property let at rents of 35*l.* and 40*l.* These parts of the testator's estate formed Lots 3, 4, and 6, mentioned in the notice of motion. They were valued, on behalf of the trustees, at 1100*l.*, 200*l.*, and 700*l.*, making together 2000*l.*; but on their being put up to sale by public auction in February, 1837, the highest biddings were, for Lot 3, 980*l.*, for Lot 4, 490*l.*, and for Lot 6, 185*l.* They were therefore bought in.

A bill was filed by a *cestui que trust*, against the purchaser of real estate from trustees, to set aside the conveyance on the ground of inadequate consideration. The purchaser insisted that the consideration was sufficient, because the title was defective, but offered to reconvey the estate on repayment, and on payment of expenses in improvements and repairs. He admitted that he had possession of the title deeds:—*Held*, that he was bound to produce them.

In November, 1837, *Weaver* contracted to buy these lots for 1200*l.*, and they were shortly afterwards conveyed to him. He had acted as solicitor for the trustees.

(a) 12 Beav.



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*Statement.*

The Defendant *Weaver* stated in his answer, that, at the time of the auction, there was no good title to the property in question; and that it was afterwards discovered that the premises had been enjoyed by the testator as of leasehold tenure only. That there was nothing to shew that he had any title to the freehold, though he had taken a conveyance in fee from a grantor, who took upon himself to convey the same premises in fee simple, without (as the Defendant believed) ever making out any valid title in himself so to do; and that the Defendant agreed to take the title as it was, without putting the sellers to any expense; and that he was now unable to make out a marketable title. And he stated that he was and had always been willing to reconvey them to the testator's heir-at-law, and to account for the rents upon being repaid the purchase-money, and what he had expended on repairs and lasting improvements, with interest. The answer further stated, that the Defendant had in his possession all the title deeds, evidences, and writings, and abstracts of title relating to the said hereditaments and premises; and he submitted, that the Plaintiff ought not to be permitted to have copies of or inspect any of the title deeds unless he would consent to pay to the Defendant the purchase-money which he paid, together with the sum of money laid out on the premises in substantial repairs and lasting improvements; and that the exposure of his title would enable the Plaintiff to injure him if he abandoned the suit.

*Argument.*

Mr. *Wright*, in support of the motion, insisted that the deeds were not material to the Plaintiff's case. He sought to set aside a deed, but the production of that deed would not assist him, and the earlier title deeds could not furnish any evidence of any alleged fraud between the Defendant and the trustees. In *Dendy v. Cross* (a) the *Master of the*

(a) 11 Beav. 91.

*Rolls* refused to order the production of a deed which was impeached. The Plaintiff ought to pay the Defendant what he had expended, or undertake to do so, before the Defendant ought to be required to produce the deeds.

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*Argument.*

Mr. *R. Palmer* and Mr. *Elderton*, contra.

The LORD CHANCELLOR said, that the Plaintiff contended that the Defendant *Weaver* ought to have paid the full value for the property which he purchased, but had not done so. The Defendant alleged that he gave a full consideration for it, because the title was defective, and the property was in fact leasehold and not freehold. There being these questions between the parties, the title deeds must be produced, to shew whether the title was good or defective; and the decision of the *Master of the Rolls* was right.

*Judgment.*

CROSS v. SPRIGG.

THIS was an appeal from a decision of the Vice-Chancellor *Wigram*, whose judgment is reported in 6 Hare, 552.

Feb. 8th &  
 18th,  
 May

The bill was filed for the administration of the estate of *Thomas Cross*. *Cross* had lent a sum of 1000*l.* to his brother-in-law, *William Gilbert*, for the purpose of establishing him in business, in copartnership. *John Gilbert*, another brother-in-law of *Cross*, and *R. West Hyde*, were sureties in the bond, each for a sum of 333*l.* 6*s.* 8*d.*; and there was a condition in it, that no proceedings should be

The obligor in a bond for 1000*l.*, and his partner in business, became insolvent, and they made a composition with their creditors, which the obligee in the bond guaranteed, and he then promised the obligor to relinquish his debt on the bond. The

compromise with the creditors could not have been carried out if the obligee had attempted to enforce his bond: —*Held*, that the transaction between the obligor and obligee amounted to such a contract as would have the effect of giving time to the principal, and that, consequently, the sureties in the bond were discharged.

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taken against the sureties until after three months' notice from *Cross*. *W. Gilbert* and his copartner became insolvent in the year 1840, and they entered into a composition with their creditors, who consented to accept 11s. in the pound, the payment of which amount was guaranteed by *Cross*; and he also promised *W. Gilbert* that the bond should be cancelled. If *Cross* had enforced the bond, *W. Gilbert* would not have been able to pay the composition; but the creditors were not aware of the existence of the bond, nor was any promise made to them respecting it.

The bond was never destroyed, and was stated to have been mislaid; and in the will of the testator, which was dated in September, 1840, the testator mentioned it among other debts, which he treated as still subsisting. He bequeathed a legacy of 300*l.* to *W.* and *J. Gilbert*, and died in September, 1841. It appeared from the evidence given by a clerk of *Cross*, that he had several times stated that he never intended *W. Gilbert* to pay the amount of the bond, but that he considered it as a gift; and also, that the widow and administratrix of *Cross* had stated to the witness that *Cross*, when ill in bed, had told her that *W. Gilbert* was not to be called upon for any of the money secured by the bond. The Master to whom the cause was referred, to take the usual accounts of the testator's estate, was directed to inquire and state whether the Defendant *J. Gilbert* was liable to pay any part of the 1000*l.* The Master found that *J. Gilbert* was not liable. Several exceptions were taken to the report, which were brought on before the Vice-Chancellor *Wigram*, who allowed them, and directed the Master to review his report. *J. Gilbert* appealed from that decision.

Upon the appeal being opened, it appeared that *J. Gilbert* was not a party to the suit as surety in the bond, but merely as a legatee under the will of *Cross*, and therefore would not be bound by any decree which might be made

upon this point; and the *Lord Chancellor*, consequently, refused to hear the case further, unless *J. Gilbert* agreed to pay any monies which the Court might consider him bound to pay. The case stood over till the 18th of February, when *J. Gilbert* agreed to submit to such order as the Court might make.

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 Statement.

Mr. *Teed* and Mr. *Hallett*, in support of the appeal, contended that the agreement which was shewn to have been come to between *Cross* and *W. Gilbert*, as to the relinquishing of the bond debt, discharged the sureties from their liabilities: *Gregg v. Wells*(a), *Eastabrook v. Scott* (b), *Britten v. Hughes*(c), *Mackenzie v. Mackenzie* (d), *Samuell v. Howarth*(e), *Mayhew v. Crickett*(f); and that the circumstance of the bond not having been delivered up or cancelled was not material under the circumstances of this case: *Richards v. Syms*(g), *Wekett v. Raby*(h), *Flower v. Marten*(i), *Eden v. Smyth*(k), *Aston v. Pye* (l), *Gilbert v. Wetherell*(m), *Moore v. Bowmaker*(n).

Argument.

The *Solicitor-General* and Mr. *Glasse*, in support of the *Vice-Chancellor's* decision.

The composition related merely to partnership debts, and the bond could only be enforced against the separate property of *W. Gilbert*. There was no agreement by *Cross* with the creditors of the partnership to give up his bond debt; he only advanced more money for the benefit of the same party, who was his debtor under the bond. If *Cross* had undertaken not to sue *W. Gilbert*, that would not discharge the sureties. He engaged to enable *Gilbert* to com-

(a) 10 A. & E. 90.

(b) 3 Ves. 456.

(c) 5 Bing. 460.

(d) 16 Ves. 372.

(e) 3 Mer. 272.

(f) 2 Swanst. 185.

(g) Barnard. 90.

(h) 2 Bro. P. C. 386.

(i) 2 My. & Cr. 459.

(k) 5 Ves. 341.

(l) 5 Ves. 350, n.

(m) 2 S. & S. 254.

(n) 6 Taunt. 379; and 2 Marsh. 81, 392.

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*Argument.*

pound with his creditors. What consideration was that for requiring him to give up his bond? *Davey v. Prendergrass* (a).

Mr. *J. Bailly* appeared for the administratrix of *Cross*.

Mr. *Teed* replied.

*Judgment.*

The LORD CHANCELLOR said he would read the affidavits before he decided the case; and in the month of May he delivered out the following judgment:—

The LORD CHANCELLOR:—

This is one of those cases in which an unfortunate departure from the regular course has brought into discussion a matter not in issue in the cause, or capable of being disposed of by any adverse proceeding in it requiring a decision. The object of the suit, and the purport of the decree, was to take the usual accounts of the estate of a testator, *T. Cross*, and, as incidental thereto, to inquire of what his personal estate consisted. The Master reported that it consisted, amongst other things, of a sum of 1000*l.*, secured by a bond of *W. Gilbert*, and in which the Appellant *J. Gilbert* and *R. W. Hyde* were each of them sureties as to one third of the 1000*l.* *J. Gilbert* happened to be a party to the cause in another character, but not as connected with this bond; and *R. W. Hyde* was not a party to the cause. It is obvious, that, as sureties in the bond, they would not have been proper parties to the suit, and that the Court had no jurisdiction to compel payment by them of any part of the 1000*l.* It appears, however, by the Master's report, of the 3rd of August, 1848, that the Counsel for the Appellant *J. Gilbert* induced the Court to direct the Master to inquire whether the Appellant was liable to pay any part of the 1000*l.* as surety for *W. Gilbert*, the obligor, without

any undertaking on his part to pay what, if anything, should be so due. The Master found that the Appellant *J. Gilbert* was not liable for any part of the 1000*l.*; and, in answer to another part of the decree, he found that it was not expedient that any proceeding should be taken for obtaining payment by *W. Gilbert* or *R. W. Hyde* of the 1000*l.* This latter inquiry must have been ordered for the purpose of enabling the Court the better to give direction for the administration of the estate; for, although a report that nothing was due from the principal debtor would operate in favour of the surety, yet the principal might still remain liable, although his surety had been discharged; and the whole case, so far as it might affect the surety, was open, upon the inquiry as to his liability. To this report the Plaintiff took exceptions, including the findings both as to the principal and the surety, and the Court having allowed the exceptions, the effect was a decision that the surety was liable for his proportion of the debt, for payment of which he had undertaken; and the surety *J. Gilbert*, having alone appealed from this decretal order, this is the only question now before me. The argument, however, before Vice-Chancellor *Wigram*, and his Honor's judgment, and the argument before me, turned principally upon the liability of *W. Gilbert* the principal. If the Court had been of opinion that the principal had been discharged, it would not have been material to consider the peculiar case of the surety; but having come to a contrary conclusion, the question, whether the circumstances amounted to a discharge of the surety, would appear to have called for a decision, because, if that were answered in the affirmative, *John Gilbert*, the present Appellant, would not have had any interest in the other inquiry; and the exceptions raising the question as to his liability, ought, at all events, to have been overruled, although no practical result can arise from the finding, either way, in this cause. I do not, however, think, that, after what has taken place,

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—  
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I ought, for that reason, to decline expressing my opinion upon that point. From the Master's report, and the evidence to which it refers, it appears that the testator having advanced 1000*l.* to *W. Gilbert*, to assist him in a partnership business, *W. Gilbert* executed a bond, to secure repayment of the same, *J. Gilbert* and *R. W. Hyde* becoming security, each for one third of that sum. The partnership business having become insolvent, *W. Gilbert* agreed with the creditors to pay a composition to them of 11*s.* in the pound upon their debts; but the property of the business being insufficient to pay such composition, if the testator exacted payment of his 1000*l.* bond debt, he agreed not to require payment, but to give it up altogether, and to guarantee to the creditors the composition of 11*s.* in the pound. The Master found that the surety was discharged, the transaction amounting to a giving of time to the principal; and in this opinion I concur. The question really is, whether, under these circumstances, the testator could call upon *W. Gilbert*, and compel him to pay the 1000*l.* He had joined in representing to the creditors that there was property equal to pay 11*s.* in the pound, but such would not have been the case if he had required payment of the 1000*l.*; and he therefore promised to relinquish that claim. Could he afterwards disappoint the expectations he had raised, and falsify the promise he had made, by compelling payment of the 1000*l.*? It is true, that, as he guaranteed the payment of the composition, the creditors, though disappointed of receiving their composition from the property, might obtain it from the testator; but under the arrangement they had the double security, and it was for them to judge whether they would take the personal guarantee of the testator in lieu of the actual produce of the estate. I think it clear, that the testator could not have withdrawn himself from the arrangement to which he had become a party, and have demanded payment of his 1000*l.* before that arrangement had been carried into effect; and consequently,

that *W. Gilbert*, the principal debtor, having had time given to him by the obligor, that is to say, a new obligation having been entered into, which protected him against payment of the debt, the surety was discharged. If the testator could have called upon *J. Gilbert* to pay his proportion of the 1000*l.*, he might have required repayment of it from *W. Gilbert*, whereby the arrangement between *W. Gilbert*, and the testator, and the creditors, would have been defeated. This is the principle upon which cases of this kind depend; and I think that the facts bring this case within that principle, and that the Master's finding, that *J. Gilbert* was not liable to pay any part of the 1000*l.*, was correct, which was all that *J. Gilbert*, even under the irregular reference of 30th July, 1847, had to do with the matter. The Plaintiff, however, in his exceptions to the Master's report, controverts all the findings, both as to his own liability and as to the liability of the principal debtor.

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 v.  
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 Judgment.

WARING v. THE MANCHESTER, SHEFFIELD, AND  
 LINCOLNSHIRE RAILWAY COMPANY. Feb. 13*th*.

THIS was an appeal from a decision of the Vice-Chancellor *Wigram*, who had overruled a demurrer which the Company had put in to the bill for want of equity (*a*).

Contractors  
 agreed to per-  
 form certain  
 works for a  
 Railway Com-  
 pany within a  
 certain time,  
 and were to be  
 paid from time  
 to time for the  
 work certified  
 by the Com-

The statements in the bill were to the following effect:—

By an agreement between the Plaintiffs and the Company,

pany's engineer to have been duly performed. In default, the Company were to be at liberty to take possession of the works, and of all the contractors' plant and materials. Some delay in performing the works was occasioned by the acts of the engineer, not repudiated by the Company, and the rate of proceeding with them was distinctly varied by him. The Company afterwards gave notice to the contractors that they were not proceeding to the satisfaction of the Company, and they soon afterwards took possession of the plant and materials. The contractors filed a bill, alleging that certificates had been unjustly withheld, and the payments had improperly fallen into arrear; and it prayed that accounts might be taken of what was due to them, and for an injunction to restrain the Company from taking the works and plant. A demurrer, for want of equity, was overruled.

(*a*) 7 Hare, 482.



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 v.  
 THE  
 MANCHESTER,  
 SHEFFIELD,  
 AND  
 LINCOLNSHIRE  
 RAILWAY CO.  
 —  
*Statement.*

dated the 2nd of March, 1847, the Plaintiffs contracted to construct a portion of the railway, comprising a space of nearly ten miles. The works were to be completed on or before the 1st of October, 1848, time being admitted to be of the essence of the contract; and the Plaintiffs were to complete all the works which were specifically mentioned in the contract, or could be fairly inferred from it. The works were to be completed to the satisfaction of *John Fowler*, the engineer of the Company, who might require any alteration, addition, or omission; and the amount of extra expense or of saving was to be left to the uncontrolled discretion of the engineer, and the Plaintiffs were not to make any alterations, additions, or omissions whatsoever, without the express direction and consent of the engineer. If the works were not completed by the time limited, the Plaintiffs were to pay a fixed sum *per diem* as liquidated damages. If they should not in every respect abide by every stipulation in the contract, or in case of any delay or default, or if they should not complete the works within the limited time, and to the entire satisfaction of the engineer, the Company were to be at liberty to take possession of the works, and provide all necessary materials, and engage other parties to prosecute the works, and to use all the materials and plant belonging to the Plaintiffs which should then be on the works. The Company were to pay 112,000*l.*, by such instalments every month (less 5*l.* per cent.), as the engineer should, at the end of any month, certify to be the proportionate value of the materials actually used and worked up, and of the work actually done by the Plaintiffs within the said month.

From the time when the Plaintiffs commenced the works, down to about the 12th of November, 1847, they proceeded in the execution of them in such a manner as would have insured their completion before the time limited by the contract. On the 1st of November, 1847, the

value of the works actually done by the Plaintiffs, and for which works they were then entitled to receive payment from the Company, subject to a deduction of 5*l.* per cent., as provided by the agreement, amounted to more than 21,000*l.*, and the amount actually paid to the Plaintiffs by the Company, up to the 1st of November, 1847, amounted only to 17,500*l.*; and although they had, in pursuance of the agreement, regularly furnished the Company with a monthly statement of the work done, they were unable to obtain from the Company any further payment. Having entered into the agreement on the faith of the Company duly observing the stipulations on their part contained, and relying in particular on the payments being regularly made, the Plaintiffs were exposed to serious loss and inconvenience, inasmuch as they had every week to pay very large sums in wages and other expenses; and, under these circumstances, two of the Plaintiffs, *Henry Waring* and *Charles Waring*, had an interview on the subject with *J. Fowler*, the engineer of the Company. That interview took place at *Rotherham*, on the 12th of November, 1847; and in the course of it, the Plaintiff *H. Waring* complained that the sums paid by the Company had been inadequate to the work done, and requested *Fowler* to give his certificates, for the future, on a more just and liberal scale. *Fowler* did not deny the justice of the complaints, but said that he would see what could be done. The Plaintiffs stated, that it was impossible they could afford to carry on the works at their present rate, unless the Company made their payments according to the agreement, and asked for directions as to the rate at which the works were to be carried on. *Fowler* replied, that the Company did not require the completion of the works within the contract time; and he authorised the Plaintiffs to make arrangements for proceeding more slowly in the execution thereof, and gave particular orders for delay as to certain parts of the works. Notwithstanding such diminished rate of progress, the

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sums actually paid by the Company, from time to time, in respect of the works, fell very far short of what was actually due to the Plaintiffs in respect thereof; and, in the month of October, 1848, the Company were very much embarrassed, and unable to provide money for the payments falling due. In compliance with a written request from the secretary of the Company, the Plaintiffs attended a meeting of the directors on the 24th of October, 1848, and, at the request of the directors, consented to receive certain bills of exchange and debentures, not in satisfaction, but by way of security for part of the sums falling due to them from the Company. No complaint whatever was made by the directors as to the delay which had taken place, or as to the rate at which the works were then proceeding.

In January, 1849, the Plaintiffs received a letter from the engineer, urging the more rapid completion of the works, and stating that the directors were anxious to have the government inspectors on the 15th of June, 1849. Three or four other letters of a similar description were sent by the engineer to the Plaintiffs, pressing them to complete by the 1st of June, which they informed him they considered impossible. They employed as many men and horses as the nature of the works allowed to be advantageously employed; but on the 21st of May, 1849, the solicitors of the Company gave notice to the Plaintiffs, that, in consequence of their default, the Company would, at the expiration of fourteen days, take the works into their own hands, and they required the Plaintiffs not to remove any of their plant or materials.

The bill alleged, that the Plaintiffs had done certain extra works, for which they had not been paid by the Company; and that, on the 1st of May, 1849, the value of the works executed by the Plaintiffs for the Company amounted to 102,786*l.* 0*s.* 2*d.*, subject, according to the contract, to

a deduction of 5*l*. per cent. and the value of the extra work, to the sum of 8932*l*. 15*s*. 3*d*., and that the Plaintiffs had received on account of such works the following sum and securities only, namely, 2000*l*. in debentures of the Company, and 98,800*l*., or thereabouts; and that a large sum, amounting to more than 10,000*l*., was then due to the Plaintiffs, but *Fowler* unjustly and unreasonably withheld his certificates in respect thereof.

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The bill charged, that, under the circumstances therein stated, the Plaintiffs, in consequence of such waiver as aforesaid, were only bound to carry on and complete the works at a reasonable rate, and within a reasonable time, such time being computed on the footing of the original contract, but modified by the delay which had taken place at the instance and with the assent of the Company; and that the Plaintiffs were only bound to proceed with the works at such a rate of progress as would have sufficed, if adopted from the commencement, for the entire completion of the works within the contract time. That, at the time when the Company gave the notice, the Plaintiffs had not made any default in carrying on the works; and that, until the 8th of January, 1849, the Plaintiffs had not received any instructions to expedite the same, but the same had been, ever since the 8th of January, 1849, carried on at a rate of progress considerably exceeding what would have been necessary for their completion within the contract time, if adopted from the commencement; that the Plaintiffs had always had on the works an ample supply of plant and materials; that a large sum was due to the Plaintiffs in respect of the works already executed by the Plaintiffs; and that the Company was unwilling or unable to pay the same, and in order to defraud the Plaintiffs thereof, *Fowler*, by the order of the directors, had unjustly and unreasonably withheld the certificates in respect thereof, and had wilfully and knowingly given certificates for

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smaller sums than were really due to the Plaintiffs; and he had, by such orders as aforesaid, unjustly withheld the certificates, and given such insufficient certificates, for the purpose of compelling and inducing the Plaintiffs to complete the works within an unreasonable time, and to carry on the same at a greater rate than the rate at which the Plaintiffs were bound to carry on the same, regard being had to the circumstances thereinbefore mentioned.

The bill prayed that it might be declared that the Plaintiffs were not bound by the stipulations contained in the contract of the 2nd of March, 1847, as to the completion of the works therein mentioned, within the time thereby limited; and that the Company had waived all right to insist on any penalty, or forfeiture, or damages, by reason of the non-completion of the works within the time limited by the contract; and for an account of what was due to the Plaintiffs from the Company, in respect of the works included in the contract and extra works; and that the Company might be restrained by injunction from removing the Plaintiffs from the works or hindering them in the execution of them; and from taking possession of the Plaintiffs' plant and materials, and from going on with the works; and from insisting on any rights of forfeiture or penalties under the agreement, by reason of the non-completion of the works within the time limited by the contract; and from commencing or prosecuting any action or suit against the Plaintiffs or any of them, for the purpose of enforcing any such forfeitures or penalty, or of recovering any damages on account of the non-completion of the works within the time limited by the contract.

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*Argument.*

The *Solicitor-General* and Mr. *Osborne* appeared for the Company, in support of the appeal, and contended, that this was not a case in which this Court would interfere, but would leave the contractors to any remedy which they

might have at law. If the Court could not compel specific performance of the agreement, it would not interfere negatively by granting an injunction. The Plaintiffs might bring an action for work done and performed, but there was no reason for their coming into a Court of equity. With regard to the extra works, there was no allegation that they had been done by the direction of the Company or their engineer.

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The cases of *Morris v. Colman* (a), *Clarke v. Price* (b), *Dietrichsen v. Cabburn* (c), and *The Taff Vale Railway Company v. Nixon* (d) were referred to.

Mr. Wood and Mr. Erskine appeared for the Plaintiffs, but were not called upon.

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The LORD CHANCELLOR:—

It appears to me that there is an ample allegation of equity in this case, whatever may be the result. Assuming the facts, which I must do for the purpose of this demurrer, to be as they are alleged, there is as great a fraud practised on individuals as could have been alleged, the transaction being, that the Plaintiffs undertake works for the Defendants to a very great extent,—of course, exhausting very much the means of any man, from the magnitude of the works to be undertaken,—on which 100,000*l.* are to be expended; and they enter into a contract, putting themselves entirely at the mercy of the Company, or the Company's agent, Mr. Fowler. Of course, this may be all fiction. I am only stating now what the bill alleges. The works are to be done, and certificates are to be granted. The result of all this is, that, from time to time, the contractors are to be paid for works which are actually done,

*Judgment.*

(a) 18 Ves. 437.

(c) 2 Ph. 52.

(b) 2 Wils. C. C. 157.

(d) 1 H. L. Ca. 111.

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Mr. *Fowler* being the party who is to ascertain their being done, and on whose certificates the Company are to be liable to pay. The Plaintiffs are to do the works within a certain time; and, if they fail in the performance of the contract, most severe penalties are imposed upon them, and there are most stringent means for the Company to be reimbursed any loss they may sustain. There is not only 5*l.* per cent. retained out of the monies which the contractors would have to receive, but the Company have power to enter on the works done, and take whatever property they may find belonging to the contractors,—all the plant, carriages, and whatever there may be upon the premises they have a right to take. The works go on, and, owing to their own pecuniary embarrassments, they are unwilling to permit them to be proceeded with at the rate specified; and the bill alleges that the Company, or *Fowler*, who was their agent for the purpose,—whether mentioned in the contract or not, he acts for them, and they do not repudiate his acts,—occasionally, and at different times, desired them not to proceed so rapidly, and stated, as the reason, that there was not sufficient money coming to pay for the expense of so rapid an execution of the works. The Plaintiffs relax, according to his directions. However, he asks them to go on with a particular portion at a much quicker rate than they ever intended to do. Everybody knows that a work of this sort, where it is accelerated, and to be done within a limited period, is much more expensive and much more inconvenient to the contractor than where a long time is allowed. The result of all this is, that, according to the terms of the contract, the Plaintiffs get involved in forfeitures. Time passes by, and the work is not done. They say the certificates are withheld,—improperly withheld, according to their allegation; they are therefore deprived of the means of paying the expenses of the works. They have not received the money from the Company which they were entitled to receive; and the delay was occasioned, not by their acts, but by the acts of the Company or

their agent Mr. *Fowler*, who directs them not to proceed so rapidly, on account of the pecuniary difficulties of the Company. Then, without any apparent reason, and, whether with reason or not,—according to the bill, without any reason, and merely for the purpose of getting an advantage over the Plaintiffs, and appropriating their money to the future operations of the Company,—they take a step which would have the effect, if supported, not only of forfeiture, depriving them of 5*l*. per cent. on the whole sum, but also depriving them of the benefit of the property which they had on the premises, which, in that case, they would forfeit and lose. They give them suddenly notice to determine the contract, which, if justifiable, would expose the Plaintiffs to the enormous loss which, under the contract, must arise from that course of proceeding.

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In the present case, the Plaintiffs positively allege, that there is money due to them to a considerable amount. The extra works, it is said, are not alleged to be done by order of Mr. *Fowler*. That is perfectly immaterial. Extra works are alleged to have been done to a certain amount, and the bill positively alleges that the Plaintiffs are entitled to payment of a certain sum in respect of such extra works. That allegation necessarily comprises within itself everything which is essential to make it true. They would not be so entitled unless they followed the course prescribed by the contract. They were not bound to allege every particular fact which would possibly be a defence to their claim. They say, we did the work. They are not bound to allege that all these works were done in a workmanlike manner, and make other allegations which are necessarily implied. Where a party undertakes to do works in a particular mode, he undertakes to do them in a workmanlike manner. If they are to be done under the superintendence and direction of an agent, and if the contractor says he is entitled to a certain amount from the Company



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for those works, the consent of the Company's agent must be assumed, otherwise the contractor would not be justified in the charge which he makes. That is an allegation upon the face of the bill, which the Defendants demurring are bound to admit. To tell the Plaintiffs, that, if these facts be true, they are not entitled to come here, is to tell them that they must give up the 5*l.* per cent, and give up the plant, which is their's unless that ground of forfeiture insisted on by the Defendants is made out. They say, "Protect this property; we have stated such a case on the face of this bill as entitles us to the protection of this property, which is ours, until, at least, the matters are investigated which are put in issue by this bill." If these facts are proved as they are alleged,—if it is proved, that, instead of Mr. *Fowler* exercising a proper discretion as between the Company and the contractors, he lends himself to the Company, and withholds certificates, in order to involve the Plaintiffs in difficulty and distress,—if he has improperly called on them to do works which, owing to the previous directions, they had been relieved from doing as to time,—if he has done all this for the purpose of depriving the Plaintiffs of the right which they had, under the contract, for the work they have done, then, beyond all doubt, the Court will protect them against the loss of that property, which is threatened against them by the notice which has been given; and that is the only question to be considered, viz. whether all the facts, put together as they stand upon the bill, do not entitle the Plaintiffs to the interposition of this Court. I am confining it to this particular point merely for the injunction to protect the property the Defendants have seized, or have threatened to seize. It is clear the Plaintiffs would be entitled to the interposition of this Court for the purpose of protecting that property.

Some allusion was made to some case before me at the

Rolls. I have no recollection of it: but this I know, that this Court does exercise a very wholesome jurisdiction in preventing the violation of negative covenants; and I do not understand how it can be matter of novelty in this Court, that this Court will interpose, by injunction, to prevent a party from violating a negative covenant. Take the case of landlord and tenant. How and why does the Court interpose to prevent a tenant doing that which he has contracted not to do? Only because he has contracted not to do it, and the Court interposes for the purpose of preventing a violation of the covenant. The party may ultimately have his remedy at law. However, on the present occasion, here is an allegation of fraud, which is quite ample to enable the parties to bring the case within the jurisdiction of this Court. Without going more into the case, it appears to me, that the fact being confined simply to the protection of that property, the forfeiture of which is sought to be enforced by the notice given, and, according to the allegations of the bill, fraudulently attempted to be appropriated by the Company and taken from the Plaintiffs, there is quite enough in this case to give the Court jurisdiction upon a part at least of the relief prayed, which is all that is necessary for the purpose of a demurrer.

The appeal will be dismissed with costs.

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A contractor agreed with a Railway Company to execute certain works, for which he was to be paid from time to time by instalments, and no works were to be considered as completed unless done to the satisfaction of the engineer of the Company, and certified by him. The contractor filed a bill, alleging that he had executed the work properly, and had performed his part of the contract, but that the engineer improperly and fraudulently withheld his certificates, and that he did so by the direction of the Company. A demurrer to the bill was overruled.

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*Statement.*

M'INTOSH v. THE GREAT WESTERN RAILWAY COMPANY.

THE Plaintiffs in this suit were the executors of *Hugh M'Intosh*, and the Defendants were the *Great Western Railway Company*, their secretary *Mr. Saunders*, and their engineer *Mr. Brunel*.

In November, 1836, *M'Intosh* entered into a contract with the *Great Western Railway Company*, for the execution of a portion of the railway. The contract contained all the usual provisions, and those which were more particularly referred to were to the effect that the works were to be done to the satisfaction of the engineer of the Company, within a specified time; and if, from any proceedings on the part of the Company, the contractor should be delayed in the prosecution of the works, the engineer was to decide what extension of time ought to be allowed. The Company covenanted to pay the contractor 27,950*l.*, by instalments at fixed periods, upon a certificate being given by the engineer of the value of the works which should then have been performed, the Company retaining one-fifth until the reserve amounted to 2000*l.*, which was not to be paid until the contract was completely performed; and it was agreed, that, upon receiving notice from the contractor, the engineer should, without delay, examine the works, and certify as to their value. No work was to be considered as completed, unless completed within the time fixed, and according to all the terms of the contract; and the works were to be kept in repair by the contractor for one year after their completion, the same to be certified by the engineer in the same manner as the completion of the works.

The bill alleged, that the Company had prevented the

contractor from proceeding with the work with the necessary degree of rapidity, by failing to give him possession of several portions of the land through or over which the railway was to be constructed; that the contractor duly performed his part of the contract; but that the engineer of the Company issued his certificates at irregular periods, and that they did not include all the works which ought to have been included in them, and that they were, in many instances, for less sums of money than were properly payable, and that a balance, exceeding 13,788*l.* 15*s.* 8*d.*, was still due from the Company; that the directors of the Company had directed *Brunel* not to advance any more money to the contractor until the accounts of another contract, which he had undertaken, were delivered; that the Plaintiffs had no means of compelling *Brunel* to issue any such certificate, and that the want thereof prevented the Plaintiffs from recovering the amount due to the estate of *M'Intosh* at law; that the transactions were so complicated, intricate, and voluminous, that they could not properly be dealt with or disposed of in any action at law.

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The works were not completed within the time limited by the contract; but the Plaintiffs insisted that the contractor was entitled to further time, on account of the delays and hindrances occasioned by the acts and defaults of the Company and their agents, and that they were completed within the time which he was entitled to have allowed him; that *Brunel* was recognised by the directors as the authorised agent of the Company, and that all his agreements and directions were adopted by them. They also charged that the certificates were withheld by *Brunel*, acting under the directions of the said Company.

The bill prayed a declaration that the withholding of the certificates of completion and repair was a fraud on the contractor, and that the Plaintiffs were entitled to re-

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ceive all such sums of money as they would have been entitled to if such certificates had been duly granted; and also a declaration, that the Plaintiffs were entitled to charge the Company in respect of all the extra, additional, and altered works; and it also prayed to have all necessary accounts taken of all the works done by *M'Intosh*, either as contract works or as extra, additional, or altered works, and of the monies due in respect thereof.

To this bill the Company, *Saunders*, and *Brunel*, put in several demurrers for want of equity. They were heard before the Vice-Chancellor *Knight Bruce*, who held that the demurrers ought to be overruled<sup>(a)</sup>. The case now came before the *Lord Chancellor*, by way of appeal from his Honor's decision.

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*Argument.*

*Mr. Bethell*, *Mr. Bacon*, and *Mr. Stevens*, for the Company, contended, that the case of the Plaintiffs rested upon two grounds: first, that the accounts were so complicated that a Court of equity alone could investigate them satisfactorily; and, secondly, that the fraud, which was alleged to exist in the withholding of the certificates, entitled the Plaintiffs to the assistance of this Court. But, with regard to the first ground, the general accounts between the parties were not in litigation: the bill merely stated some points of dispute between the parties, which might be settled as well at law as in equity. And, as to the second ground, if there was any fraud, the Plaintiffs could take advantage of it as effectually at law as in this Court. If the Company prevented the certificates from being given, they could not set up the absence of them as a defence to the action. And, even if they could, the Plaintiffs could still recover in an action of damages.

(a) See the judgment of the *Vice-Chancellor*, and the allegations in the bill, fully stated in 3 De G. & S.

Sir *F. Kelly*, Mr. *J. Russell*, Mr. *Lloyd*, and Mr. *Hetherington*, for the Plaintiffs, insisted, that if the Plaintiffs attempted to enforce their demands in an action at law, it would be necessary to go into all the accounts, and that a Court of law was unable to take such accounts effectually. But the Plaintiffs could not succeed in any action at law, because they were unable to produce the certificates of the engineer. They were only entitled to demand such sums as those certificates should state that they were entitled to. Whether the procuring of the certificates was or not a kind of condition precedent, if they were withheld fraudulently, this Court would counteract that fraud.

Mr. *Bethell* replied.

The following authorities were referred to:—*Heath v. Chadwick* (a), *Pim v. Wilson* (b), *Kirk v. The Bromley Union* (c), *Jackson v. The North Wales Railway Company* (d), *Hotham v. The East India Company* (e), *Holme v. Guppy* (f), *The Taff Vale Railway Company v. Nixon* (g), *Ambrose v. The Dunmow Union* (h), *West v. Blakeway* (i), *Doughty v. Neal* (k); Bac. Abr., tit. "Conditions;" Com. Dig., tit. "Condition," (L), 6; Vin. Abr., tit. "Condition," (T).

The LORD CHANCELLOR:—

I have examined with great care the statements in the very voluminous bill in this case, and have come to the conclusion that the Vice-Chancellor *Knight Bruce's* judgment is correct; and in affirming it I do not think that

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(a) 2 Ph. 649.

(b) Id. 653.

(c) Id. 640.

(d) 1 Hall & T. 75.

(e) 1 T. R. 638.

(f) 3 M. & W. 387.

(g) 1 H. L. Cas. 111.

(h) 9 Beav. 508.

(i) 2 Man. & Gr. 750.

(k) 1 Saund. 215.

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any of the decisions upon similar subjects are in the least disturbed. It will probably be extremely difficult for a Court of equity to do justice to the Plaintiffs, according to the case made by the bill; but there does not appear to be any possibility of a Court of law doing so. What might be the effect of such a state of things if this impossibility had arisen from the act or conduct of the Plaintiffs it is not necessary to consider, because it is, I think, sufficiently stated and shewn that it not only exists in this case, but that it has arisen from the conduct of the Defendants,—not adopted, probably, from any fraudulent intention or schemes, but now made the instrument of fraud, if it should prevail, to prevent the Plaintiffs from recovering payment of what is justly due to them.

The subject-matters upon which the Plaintiffs seek the assistance of equity are various, but in most of these the same ground exists; and, as it is sufficient for the present purpose to see that a case is made for some relief, I purpose confining myself to that point which is common to many of the subject-matters of the bill, and as to which, the facts stated, if true, are, I think, sufficient to entitle the Plaintiffs to the assistance of this Court.

It is true that the specification and contract constitute a relationship between the Plaintiffs and the Defendants, which, if correctly acted upon, would have given to the Plaintiffs a legal right, and a legal right only, to the benefits they claimed by this bill. But if the facts stated in the bill are such as, if true, deprive the Plaintiffs of the means of enforcing such legal rights, and if those facts have arisen from the conduct of the Defendants or of their agent, so recognised by the specification and contract, and now used for the fraudulent purpose of defeating the Plaintiffs' claim altogether, the Defendants cannot resist the Plaintiffs' claim in equity, upon the ground that their remedy is only at law; nor is it

any answer to shew, that, if the Plaintiffs cannot get at law what they contracted for, they may obtain compensation in damages. It is no answer to a bill for specific performance, that the Plaintiff may bring an action for damages for a breach of the contract, or in a proper case for the recovery of some specific chattels, that damages may be recovered in trover,—the language of pleading is not that the Plaintiff has no remedy, but no adequate remedy save in a Court of equity. It is, therefore, no answer, in the present case, for the Defendants to urge, that, if they or their agent have been neglectful of what they undertook to do, by which the Plaintiffs have suffered, they may be liable in damages to the Plaintiffs. They contracted for a specific thing, and are not bound to take that or something in lieu of it, if such other thing be not what this Court considers as a fair equivalent. I do not, therefore, consider that any answer is given to the Plaintiffs' right to file a bill in this Court, by shewing that the ground upon which they seek their right so to do, namely, the being barred of their legal remedy by the conduct of the Defendants, may subject them to damages at law. It was, indeed, urged, that the Plaintiffs' remedy at law was not affected by the facts alleged in the bill, because it was contended, that a condition precedent, the performance of which was rendered impossible by the conduct of the Defendants, could not affect the Plaintiffs' right, upon the authority of *Hotham v. The East India Company* (a); but the present is not a contract dependant upon a condition precedent, but the matter to be performed, and the performance of which has been prevented by the conduct of the Defendants, is part of and of the essence of the contract itself, and without the performance of which it is provided that no right under the contract shall arise. The case made by the bill in this respect varies according to the fact; but the principle is included in all extra work,

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(a) 1 T. R. 638.



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for instance, the payment of which was to be regulated by periodical admeasurements; and a fixed rate of charge cannot now be so regulated, being covered and concealed by other works made under the directions of the agent of the Defendants. The contract, therefore, though capable of being performed after a due investigation, cannot be the subject of an action upon the terms of it. Similar observations apply as to other parts of the case, such as the works not being completed within the prescribed time, and the causes which led to that omission.

It appears to me, therefore, that this is clearly a case in which the Plaintiffs cannot obtain what they are entitled to at law, and that their inability to do so has arisen from the acts of the Defendants or their agent; and whether such acts arose originally from any fraudulent motive or not, I think, that, to use them for the purpose of defeating the Plaintiffs' remedy would constitute a fraud which this Court will not permit the Defendants to avail themselves of; and that they are, therefore, precluded, according to the statements in the bill, from raising the objections they rely upon to the Plaintiffs' equity; and that there is sufficient allegation of that of which the fraud consists. The demurrer was, therefore, I think properly overruled, and this appeal must be dismissed, with costs.

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THE SHREWSBURY AND BIRMINGHAM RAILWAY COMPANY v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY, THE SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY, GEORGE CARR GLYN, AND WILLIAM COWAN.

Feb. 19th,  
20th & 23rd.

THIS was a bill filed by the *Shrewsbury and Birmingham Railway Company* against the above-mentioned several parties, praying, amongst other things, that the Defendants might be decreed to keep distinct accounts of the passengers, traffic, &c., which the *London and North Western Railway Company* and the *Shropshire Union Railways and Canal Company* should carry or convey from *Shrewsbury, Wellington*, or from any part between those places, to *Rugby*, or to any place to the south of, or on the *London* side of *Rugby*, on the line of the *London and North Western Railway Company*; and of all passengers, traffic, &c., which such Companies, or either of them, should carry or convey from *Rugby*, or from any place to the south of, or on the *London* side of *Rugby*, on the line of the *London and North Western Railway Company*, to *Wellington* or *Shrewsbury*, or to any part between those two last-named places; and

The *S. and B. R. Co.* opposed a bill brought into Parliament by the *L. and N. W. R. Co.*, seeking to authorise a lease to that Company of a scheme in process by the *S. U. R. Co.*, whereupon an agreement in writing was come to between the Companies, that, in consideration of the withdrawal of the opposition by the *S. and B. R. Co.*, an account should be kept of the profits received from the traffic on the lines

*S. and B. R. and S. U. R.*, and that the profits to be received in respect of the traffic should be divided between them, in certain proportions. By reason of the withdrawal of the opposition, the bill was passed:—*Held*, that the agreement was not a fraud on Parliament, or illegal.

*Held*, also, that an agreement entered into by two Companies, by which one of those Companies agreed that it would not prejudice, or, by an indirect and circuitous course, interfere with the traffic passing on the direct line of the other Company, was not illegal.

An Act of Parliament recited three other Acts, one only of which had relation to an agreement entered into between the Plaintiffs and Defendants. By the 1st sect., on the completion of the works of the three lines of railways, by the recited Acts authorised to be made, so as to be opened for public traffic, or at such other period as might be agreed upon, the *S. U. R. Co.* were empowered to grant to the *L. and N. W. R. Co.* a lease in perpetuity of the undertaking. By the 11th sect. of the same Act it was enacted, that, as each of the lines of railway should be completed, the same should be worked and used by the *L. and N. W. R. Co.*, and for the purposes of such working, the *L. and N. W. R. Co.* were to exercise the powers before given by the Act to the *S. U. R. Co.*, in relation to every such completed railway. Other sections of the Act spoke of the "*lease of the said railways*" and the "*making of such lease*:"—*Held*, that, according to the true construction of the Act, there was no postponement of the rights of the parties to the benefit of the provisions of the lease, until the whole of the three lines had been completed.

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also, a like separate account of all sums received by them in respect of such passengers, traffic, &c., in accordance with the articles of agreement hereinafter set forth; and that the Defendants might be decreed to supply the Plaintiffs with half-yearly accounts of all matters comprised in the first clause of the articles of agreement; and that the amount due to the Plaintiffs, on the taking of the necessary accounts, might be decreed to be paid to them by the Defendants; and that the Defendants might be enjoined from conveying or carrying any passengers, cattle, goods, &c., from *Shrewsbury* or *Wellington*, or from any point between those places, to any point or place on the line of the Plaintiffs, or the *Birmingham, Wolverhampton and Stour Valley Railway*, or using the line of the *Shropshire Union Railway Company*, by *Gnosal* or *Stafford*, to compete for any traffic which properly belonged to the Plaintiffs. The transactions between the parties are briefly, but sufficiently stated by the *Lord Chancellor* in his judgment. The articles of agreement, which were dated the 12th of October, 1847, and made between the Plaintiffs of the one part, and the Defendants, the two other Companies, of the other, were as follows, viz.:—

“Whereas the line of railway in course of formation between *Shrewsbury* and *Wellington* is common to the *Shrewsbury and Birmingham Railway Company* and the *Shropshire Union Railways and Canal Company*, and is under the direction and control of the joint committee of management. And whereas a bill was introduced into Parliament, during the last session, for authorising a lease in perpetuity of the undertaking of the said *Shropshire Union Railways and Canal Company* to the said *London and North Western Railway Company*, and the same was opposed by the said *Shrewsbury and Birmingham Railway Company*. And whereas the said *Shrewsbury and Birmingham Railway Company* agreed to withdraw their opposi-

tion to the said bill, on its being mutually arranged and agreed between the said several Companies that the covenants and agreements hereinafter contained should be mutually entered into by them, on an Act of Parliament being obtained for authorising such lease as aforesaid, or a lease, between the said parties, of any part of the said undertaking between *Shrewsbury* and *Stafford*. And whereas such Act was obtained during the last session of Parliament: Now, therefore, these presents witness, and it is hereby mutually covenanted, declared, and agreed, by and between the said several Companies parties hereto, the said *London and North Western Railway Company* and *Shropshire Union Railways and Canal Company* covenanting and agreeing for themselves, for and in respect of their own acts and deeds only, and the said *Shrewsbury and Birmingham Railway Company* covenanting and agreeing for themselves, for and in respect of their own acts and deeds only, and not the one contracting party for the acts and deeds of the other contracting party; first, that the said *Shropshire Union Railways and Canal Company*, or the *London and North Western Railway Company*, shall and will from time to time, and at all times hereafter during the continuance of any such lease authorised to be granted by the said Act, make and keep a separate and distinct account of all passengers, cattle, luggage, goods, and other matters and things, which such Companies, or either of them, shall carry or convey from *Shrewsbury* or *Wellington*, or from any point between these two places, to *Rugby*, or to any place to the south of, or on the *London* side of *Rugby*, on the line of the *London and North Western Railway Company*, and also of all passengers, cattle, luggage, goods, and other matters and things, which such Companies, or either of them, shall carry or convey from *Rugby*, or from any place to the south of, or on the *London* side of *Rugby*, on the line of the *London and North Western Railway Company*, to *Wellington* or *Shrewsbury*, or to any

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point between these two last-named places; and also, a like separate and distinct account of all sum and sums of money which such last-mentioned Companies or either of them should receive for the carrying or conveying of all passengers, cattle, luggage, goods, and other matters and things whatsoever, of or respecting which they are to keep such separate and distinct accounts as aforesaid; and the said *Shrewsbury and Birmingham Railway Company* shall and will, in like manner, and during the like period, make and keep a separate and distinct account of all passengers, cattle, luggage, goods, and other matters and things, which such last-mentioned Company shall convey or carry from *Shrewsbury* or *Wellington*, or from any point between these two places, to *Rugby*, or any place to the south of, or on the *London* side of *Rugby*, upon the line of the said *London and North Western Railway Company*, or to *London*, either upon the said last-mentioned line, or upon that of any other Company; and a like separate and distinct account of all sum and sums of money which the said *Shrewsbury and Birmingham Railway Company* shall receive for the carrying or conveyance of such passengers, cattle, luggage, goods, and other matters and things of or respecting which they are to keep such separate and distinct accounts as aforesaid. Secondly, that the said *Shropshire Union Railways and Canal Company*, or the said *London and North Western Railway Company*, on the one part, and the said *Shrewsbury and Birmingham Railway Company* on the other part, shall respectively, from time to time, make out and supply to the other of them a half-yearly account, in abstract, of all the matters mentioned and comprised in the said first article or clause, which accounts shall be subject to be audited by the respective auditors for the time being of the said hereby contracting Company; and all the accounts mentioned in the second schedule or clause shall be open at all times to the inspection of the directors of either of the said contracting Companies, or of any persons

duly authorised by them; and it shall from time to time be ascertained and determined by the auditors of the said contracting Companies, how much of the monies, by such accounts appearing to have been received, shall have been received for and in respect of the distance from *Shrewsbury* to *Wellington*, or from any point between those two places to *Stafford* or *Wolverhampton*, to *Shrewsbury* or *Wellington*, or to any point between those two places; and such sum, when so ascertained, shall be divided between the said *Shropshire Union Railways and Canal Company* and *London and North Western Railway Company*, as one party, and the said *Shrewsbury and Birmingham Railway Company* as the other party, in the following proportions; that is to say, 6-13th equal parts to the *Shropshire Union Railways and Canal Company* and *London and North Western Railway Company*, and the remaining 7-13th equal parts to the *Shrewsbury and Birmingham Railway Company*, those proportions being considered as substantially corresponding with the relative lengths of the line of the *Shropshire Union Railways and Canal Company* from *Wellington* to *Stafford*, and the line of the *Shrewsbury and Birmingham Railway Company* from *Wellington* to *Wolverhampton*. Thirdly, that, during the continuance of any such lease as aforesaid, the said *Shropshire Union Railways and Canal Company* and *London and North Western Railway Company*, or either of them, shall not nor will convey or carry any passengers, cattle, luggage, goods, or other matters or things, from *Shrewsbury* or *Wellington*, or from any point between those places, to any point or place on the line of the *Shrewsbury and Birmingham Railway* or the *Birmingham, Wolverhampton, and Stour Valley Railway*, nor use the line of the *Shropshire Union Railway* by *Gnosal* or otherwise to compete for any traffic which properly belongs to the *Shrewsbury and Birmingham Company*. Fourthly, that the agreement hereby come to shall not in any manner be evaded or eluded by either of the contracting parties."

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The 4th clause also contained an agreement for reference to the arbitration of Mr. *Robert Stephenson*, in case of any dispute arising between the parties as to the import or construction of the articles of agreement.

By the 1st sect. of the Act 10 & 11 Vict. c. cxxi, it was enacted, amongst other things, "That, on the completion of the works of the railways by the said recited Acts authorised to be made, so as to be opened for public traffic, or at such earlier period as may be agreed upon between the said Companies, the *Shropshire Union Railways and Canal Company* shall, and they are hereby empowered and required, to grant, and the *London and North Western Railway Company* shall, and they are hereby empowered and required to accept, a lease in perpetuity of the undertaking of the said *Shropshire Union Railways and Canal Company*, at a rent which shall be equal to interest, after such respective rates as hereinafter mentioned, on the aggregate amount of the canal capital of the said *Shropshire Union Railways and Canal Company*, and of the share capital which shall have been raised and expended for the formation of the said railways authorised by the said recited Acts, and also on the canal debt of such Company, and on the money which shall be borrowed under the provisions of the said recited Acts; the interest on the aggregate amount of the said canal capital and share capital, which shall have been raised and expended as aforesaid, to be computed at a rate equal to half the rate per cent. per annum of the dividend which shall from time to time be payable on the capital stock of the *London and North Western Railway Company*; and the interest on the said canal debt, and the money to be borrowed as aforesaid, to be computed after the rate which the securities or the substituted securities for the same, for the time being, shall actually carry, and such rent to be subject to variation accordingly: and by such lease there shall be also re-

served and made payable to the said *Shropshire Union Railways and Canal Company*, such part as hereinafter provided of the surplus profits, estimated as hereinafter provided, of the said undertaking, after payment of the said rent."

The 2nd sect. of that Act was as follows, viz:—"That, from and after the passing of this Act, the undertaking of the *Shropshire Union Railways and Canal Company* shall, (subject to the provisions herein contained,) be managed by a joint committee, to consist of eight of the directors of the *Shropshire Union Railways and Canal Company* and eight of the directors of the *London and North Western Railway Company*."

By the 11th sect. it was enacted, "That when and as each of the said railways shall be completed and opened, the same shall be worked and used by the *London and North Western Railway Company*, who shall observe all such directions in relation thereto as the said joint committee shall make, consistently with the provisions of this Act and of the lease to be granted in pursuance thereof; and, for the purposes of such working and use, the said *London and North Western Railway Company*, and their officers, agents, and servants, shall have, use, and exercise all such powers and privileges in relation to every such completed railway as were granted to the *Shropshire Union Railways and Canal Company*, and their officers, agents, and servants, by the Act authorising them to maintain and work and use such railway, and as if the name of the *London and North Western Railway Company* had been inserted in such Act in lieu of the name of the *Shropshire Union Railways and Canal Company*, and so from time to time, as each of the said railways shall be completed."

The 12th sect. was as follows, viz:—"That the *London and North Western Railway Company* shall provide

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all engines, carriages, and other locomotive establishment, necessary to work the railways hereby authorised to be leased."

And by the 19th sect. it was enacted, "That, when any one of the said railways shall have been completed, before the completion of all such railways, then and in each such case the amount of the share capital which shall have been raised and expended for the formation of such railway shall be ascertained; and thenceforth, until the completion of all the said railways, a rent shall be payable by the *London and North Western Railway Company* to the *Shropshire Union Railways and Canal Company*, equal to interest after the rate hereinbefore stipulated, on the share capital which shall have been so raised and expended for the formation of such completed railway, and on the money, if any, borrowed for such formation, and on the whole of the canal capital of the said *Shropshire Union Railways and Canal Company*; and when another of the said railways shall be subsequently completed, such rent shall be increased by interest, after the stipulated rates, on the share capital raised and expended, and the money borrowed, if any, for the formation of such other railway, and by one moiety of the interest payable upon the canal debt; such rent and increased rent respectively to be considered as commencing and to be computed from and after the 30th day of June or 31st day of December, which shall first happen after the completion of such first or other railway respectively; the first half-yearly payment to be made on the 1st day of March or the 1st day of September which shall first happen after the expiration of six months from such commencement; and such rent or increased rent respectively to continue until the rent to be reserved on such lease shall become payable."

The early part of the 24th sect. was as follows:—"That,

until the lease of the said railways hereby authorised shall be completed, all the profits derived from so much of the canals, and the works and property connected therewith, of the *Shropshire Union Railways and Canal Company*, as shall not have been converted into or used for the purposes of the said railways, shall be applied, in the first place, in payment of the interest on the canal debt of the said Company, or so much thereof as shall not be payable by the *London and North Western Railway Company*," &c., &c.

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And by the 25th sect. it was enacted, "That, after making the lease hereby authorised to be made, and notwithstanding such lease, so much of the canals, and works and property connected therewith, of the *Shropshire Union Railways and Canal Company*, or so much of such canals, works, and property as shall not be converted into or used for the purposes of the said railways or any of them, shall continue to be managed and worked under the direction of the said joint committee, in the name of the *Shropshire Union Railways and Canal Company*."

The Defendants, the two Companies, and *George Carr Glyn*, on the 12th of January, 1850, filed three distinct demurrers to the bill, for want of equity, which the *Vice-Chancellor of England*, on the 31st of that month, after argument allowed. The grounds of his Honor's decision will be found stated in the judgment of the *Lord Chancellor*. The Plaintiffs presented a petition of appeal against that decision.

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Mr. *Rolt*, Mr. *Malins*, and Mr. *Hardy*, appeared in support of the appeal.

Argument.

Mr. *Bethell*, Mr. *Willcock*, and Mr. *Follett*, for the several Respondents, contended, that the Companies were not ca-

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pable of being partners *inter se*; that, even if the agreement were a valid one, it was wholly prospective, and was not intended to enure to the benefit of the *London and North Western Railway Company*, until the whole of the contemplated lines had been completed; that the only lease intended by the parties, was a lease of the *entirety* of the undertaking; and that the liabilities of the *London and North Western Railway Company* were to commence, only when they should have actually obtained such lease; that, if such were not to be the construction by the Court, the advantages to be reaped from the arrangement would be altogether in favour of the Plaintiffs; that one rent only was reserved and made payable by the Act 10 & 11 Vict. c. cxxi, and that could only be ascertained after the completion of the whole undertaking; that the 24th and 25th sects., which spoke only of one lease, contained one destination of the profits under such lease, when granted, and another destination of the profits previously to such lease being granted; that the partnership entered into between the Companies was illegal; that one Railway Company could not alien its undertaking to another Railway Company, except under some power comprised in an Act of Parliament; *Natusch v. Irving* (a); that, if such a course of proceeding were permitted to be practised, the interests of the public would be eventually sacrificed; that the circumstances in the present case were of a much graver character than those in *Simpson v. Lord Howden* (b); that the present was not a case of vendor and purchaser, as in the case of *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company* (c), but of partnership, in which, if any portion of the agreement could not be performed, the whole was void; and that, if the Court entertained any doubt as to the proper construction of the articles of agree-

(a) Gow on Partnership, Appendix,  
p. 407.

(b) 3 My. & Cr. 97.

(c) 2 Ph. 597.

ment, the matter should be sent to a Court of law for its opinion.

Mr. *Malins* was heard in reply

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*Argument.*

The LORD CHANCELLOR :—

These were demurrers by the *London and North Western Railway Company* and the *Shropshire Union Railways and Canal Company*, to a bill filed by the *Shrewsbury and Birmingham Railway Company*, seeking the performance of an agreement entered into between the three Companies. The *Vice-Chancellor* allowed the demurrers, upon the ground, as he stated, that the time was not come at which the Plaintiffs had a right to raise the question on that agreement; that is to say, that the time had not arrived when the agreement was to come into operation.

*Judgment.*

Several other grounds, however, were raised on the argument of these demurrers before me, on which it was contended that the demurrers might properly be allowed, even if the objection on which the *Vice-Chancellor* proceeded was not considered satisfactory. It was contended, that the contract was a fraud on Parliament; that the *London and North Western Railway Company* had no power to do that which they have agreed to do; and that the arrangement was inconsistent with the duty which that Company owed to the public and to their own subscribers: in short, that it was an undertaking to do that which they had no right to do, and, therefore, a contract which the Court would not carry into effect.

Now, the short history of the transactions which led to

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this agreement was simply this:—The railway which the Plaintiffs have made, and which was the foundation of the agreement, was a railway from *Shrewsbury* to *Wolverhampton*; the other Company, viz. the *Shropshire Union Railways and Canal Company*, had also a railway to make from *Shrewsbury* to *Stafford*. The first part of the line, namely, from *Shrewsbury* to *Wellington*, is a line common to the two. At *Wellington* the two lines diverged, the Plaintiffs' line proceeding to *Wolverhampton*, the line projected by the other Company proceeding to *Stafford*, and there joining the *London and North Western Railway*. There was also a line from *Rugby* to *Birmingham* constructed, but there was no regular direct line of railway from *Birmingham* to *Wolverhampton*. That line had been projected; and it is sufficient for the present purpose that the *London and North Western Railway Company*, according to the allegation contained in the bill, have, by a lease obtained from the parties who had projected that railway, become liable to perfect that railway and to use it. That was part, therefore, by derivation of title from others, of their property, and part of the duty which they had undertaken to perform; and the bill alleges, that they might and ought to have completed that line. If that line had been completed, there would be a continuous railway from *Shrewsbury* to *Rugby*, and shorter than the line from *Shrewsbury* to *Wellington* by *Stafford* to *Rugby*. Consequently, if other matters were equal, and the fares charged were in proportion to the distance, there would be a strong inducement to the public travelling from *Shrewsbury* to *Rugby* to proceed by that line of which the Plaintiffs' railway formed part, instead of going round by *Stafford*, which would bring them to the same point, after passing over a greater distance, and describing a large curve. The *London and North Western Railway Company* were desirous of obtaining a lease from the *Shropshire Union Railway Company* of several schemes which that Company had in

contemplation, and for the construction of which they had obtained Acts of Parliament; and it must be recollected, that the line between *Shrewsbury* and *Wellington* was a part of their adventure, but part also of their adventure which they had in common with the Plaintiffs' railway, and which for that distance, under arrangements, was made and worked by those two Companies in common. The project of the *London and North Western Railway Company*, for obtaining a lease of the scheme in progress by the *Shropshire Union Railways and Canal Company* was opposed, and naturally enough, by the Plaintiffs in Parliament, because it was conceived that opening the line from *Shrewsbury* to *Stafford* would obviously be a means of carrying passengers and goods from *Shrewsbury* to *Rugby*, though not by the shortest route, yet by a way which, being under the control of so powerful a Company as the *London and North Western Railway Company*, would be very likely to interfere with the business of the Plaintiffs' railway. They therefore opposed this bill in Parliament. An arrangement was thereupon come to between the parties. I am now speaking of the language of the articles of agreement set out in the bill; it was to this effect, viz. that, in consideration of the withdrawal of the Plaintiffs' opposition, and, therefore, permitting the *London and North Western Railway Company* to obtain a bill enabling them to take a lease of the schemes of the *Shropshire Union Railways and Canal Company*, they should come under certain arrangements between the *London and North Western Railway Company*, and that other Company, and the Plaintiffs' Company. The agreement for that purpose, which is the agreement sought to be performed by the bill, the bill also seeking to restrain any acts inconsistent with the undertakings and duties which the *London and North Western Railway Company* and that other Company have imposed on themselves by this contract, recites, that a line of railway was in the course of formation between *Shrewsbury* and

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*Wellington* in common, for the use of the *Shrewsbury and Birmingham Railway*, which is the Plaintiffs' railway, and the *Shropshire Union Railways and Canal Company*, and under the direction and control of a joint committee of management. It then recites, "That a bill was introduced into Parliament, during the last session, for authorising a lease in perpetuity of the undertaking of the said *Shropshire Union Railways and Canal Company* to the said *London and North Western Railway Company*, and that the same was opposed by the *Shrewsbury and Birmingham Railway Company*." It then recites, "That the *Shrewsbury and Birmingham Railway Company* agreed to withdraw their opposition to the said bill, on its being mutually arranged and agreed between the said several Companies, that the covenants and agreements hereinafter contained should be mutually entered into by them, on an Act of Parliament being obtained for authorising such lease as aforesaid, or a lease between the said parties of any part of the said undertaking" (in the singular number again), "between *Shrewsbury and Stafford*." It then recites the Act that had passed in the last session of Parliament, and then there come the covenants and agreements, to which I shall have occasion presently to refer.

Now, adverting in the first instance to the objection which was felt by the *Vice-Chancellor*, and on which he allowed the demurrers, viz. that the Act of Parliament (10 & 11 Vict. c. cxxi) contained provisions indeed for a lease, but that the time had not arrived at which that lease was to be granted: that Act recites three other Acts, the three other Acts being schemes of the *Shropshire Union Railways and Canal Company*. It recites the Acts of 9 & 10 Vict. chapters cccxxii, cccxxiii, and cccxxiv; chapters cccxxii and cccxxiv relate to matters not immediately connected with this arrangement between the Plaintiffs' railway and the *London and North Western Railway*; but

chapter *cccxiii* does, inasmuch as that is the Act under which the line was to be completed from *Shrewsbury* to *Stafford*. The other two chapters relate to other schemes and other places not immediately affecting this transaction,—one indeed totally unconnected with it,—but neither of them directly interfering with that which was in contemplation between these two railways. The question is, according to the point on which the *Vice-Chancellor* decided, whether a lease was to be granted by the *Shropshire Union Railways and Canal Company* to the *London and North Western Railway Company*, of any portion of any one of these works, before the whole had been completed? The *Vice-Chancellor* was of opinion that there was no intention, no contract, between these parties for a lease of any one of these railways, but that all was in abeyance until the whole of these works were completed, and then, that there was to be a joint lease of the whole; and there being no proof that any one of these three projects had been completed, excepting the one from *Shrewsbury* to *Stafford*, he was of opinion, the time had not arrived at which the Plaintiffs were entitled to put this contract in force.

Now certainly, looking through this Act of Parliament, there is great confusion of language and expressions found in it, well calculated to raise doubts and difficulties; but my construction of that Act is, (whether the actual lease could or could not be granted, is not material,) that all the rights and liabilities arise on each of those railways, as soon as each particular railway was completed; and that there was no suspension of the right of the lessors or lessees till the whole was completed. It would indeed be a very strange thing if that had been the intention, because the undertaking being totally and entirely distinct, it would be extremely inconvenient to make the obligations upon each particular railway depend on the completion of another railway, which had no connection with the one pro-

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posed to be completed. Now the term used is "lease," as if there was to be one lease, and in many parts of the Act it would appear that only one lease was to be made for all.

In the 1st sect. the Act provides, [Here his Lordship read the 1st sect.] Then it proceeds to describe the terms on which the payments were to be made, on which observations were made, which, in the view I take of the case, I do not think it necessary to inquire into. Here, then, are three distinct works; a lease in the plural number is proposed to be made "on the completion of the works of the said railways," and then it is to be "a lease in perpetuity of the undertaking." That of itself is sufficient, in starting, in the 1st sect. of an Act of Parliament, to raise a considerable difficulty in putting a construction on its meaning. But there are subsequent clauses, which appear to me to leave no doubt that the rights and liabilities of the parties were to arise upon the completion of each of those works, so far as the particular work was concerned. And the 11th clause is very strong for that purpose. There are several clauses which I do not think it necessary particularly to advert to; but those that are the strongest I will shortly state. By the 11th sect. it is enacted, [His Lordship here read the 11th sect.] Now, here is a provision which makes the relative situation of landlord and tenant arise as to each railway, upon each railway being completed; and, on looking at that section alone, the construction would be, that, although the actual lease was to be postponed till the railway was completed, yet that the relative situation of these particular parties, *quoad* that particular railway so completed, was to commence on that particular railway being finished, the directors, who were to have the management, being directed to conduct the management "consistently with the provisions of the Act, and of the lease to be granted in pursuance thereof;" so that they are to look at the lease, whatever effect the pro-

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visions of that intended lease are to have with respect to that particular railway so completed, the *London and North Western Railway Company* are to have possession of it; they are to work it; and, if they are to work it, they are to pay the consideration which they undertook to pay to those from whom they took it in respect of that particular railway so completed. And the terms are, that it shall be done "consistently with the provisions of the Act, and of the lease to be granted in pursuance thereof." It is obvious, either that there was to be or might be a separate lease for that particular railway, or that the whole was intended to be comprised in one lease. It is singular enough, because the matters are totally and entirely distinct, and have no connexion with each other; but it might be that the parties might have thought proper to have matters so unconnected included in one lease. But, be that as it may, whether the lease was to be granted immediately, or postponed till the whole was effected, the *London and North Western Railway Company* was to have possession. They were to have the working of it. Of course, they were to receive the profits of it, and the management of it was in the meantime to be according to the provisions of the lease to be granted. The relative position, therefore, of landlord and tenant, was clearly and distinctly established. Whether the lease was executed or not could not in this Court make the slightest difference.

Then, there are several other sects., which it is scarcely worth commenting on. They were mentioned in the course of the argument, but they all tend to the same construction.

The 31st sect. is as follows, viz.:—"That it shall not be lawful for the said *Shropshire Union Railways and Canal Company*, by virtue of the powers hereinbefore contained, to demise or lease, nor for the said *London and North*

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*Western Railway Company* to enter into or accept, such lease of the undertaking of the first-mentioned Company, unless it shall have been proved to the satisfaction of the Commissioners of Railways," &c. There are several other similar instances.

The result, therefore, of the Act appears to me to be, that there was no postponement of the rights of the parties to the benefit of the provisions of the lease, until the whole was completed; and, if there be any doubt on the construction of that Act at all, it would be merely that the lease itself was not to be executed, but that, for all beneficial purposes between the parties, it was to come into operation as to each railway, on that particular railway being completed.

That being the view I take of the construction of the Act, it would of course dispose of the ground on which the *Vice-Chancellor* determined this case; because, it being a fact stated, and, therefore, admitted, that that particular line, namely, from *Shrewsbury* to *Stafford*, had been completed, the effect is, that the intended lease would come into operation as to that line, from the moment that that line of railway was opened.

Then comes the contract made between the Plaintiffs and *The London and North Western Railway Company*, which was in consideration of their not opposing that bill. It is singular enough to observe the language in which it takes notice of that bill, and the object of that bill. Suppose the effect of that agreement is adjourned till all the three adventures, stated in the preamble of the leasing bill, have been completed. But what does this agreement recite? Why, it naturally enough takes no notice of that part of the leasing power with which the Plaintiffs were totally unconnected and had nothing to do. But it does take

notice, and takes notice only, of that portion of the leasing power by which they were to be affected; for it says, "Whereas the line of railway in course of formation between *Shrewsbury* and *Wellington* is common to the *Shrewsbury and Birmingham Railway Company* and the *Shropshire Union Railways and Canal Company*, and is under the direction and control of a joint committee of management; and whereas a bill was introduced into Parliament during the last session, for authorising a lease in perpetuity of the undertaking of the said *Shropshire Union Railways and Canal Company* to the said *London and North Western Railway Company*, and the same was opposed by the said *Shrewsbury and Birmingham Railway Company*." It takes notice, therefore, only of that one line, viz. that line which, if completed, would come into competition with the Plaintiffs' line: it takes no notice at all of the other two lines, but proceeds in the singular number, referring, first of all, to that particular and single line that was to affect them, and speaks of authorising a lease in perpetuity of the undertaking. There were three undertakings in the leasing power, but there was only one that affected the Plaintiffs; and that one is the only one referred to in these articles of agreement. It was for not opposing the bill *quoad* that line that this agreement was entered into. The parties confined themselves to that which concerned themselves mutually, and the contract, therefore, never could be supposed to be postponed till a lease was obtained of other lines totally unconnected and not at all referred to in that contract, but merely that line which did affect them both, and which is in terms referred to by this contract.

Then it proceeds to recite, as I before mentioned, the "Act of Parliament being obtained for authorising such lease as aforesaid." The only lease referred to as aforesaid was the lease of the *Shrewsbury and Stafford* line, "or a lease

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between the same parties of any part of the said undertaking between *Shrewsbury* and *Stafford*." There you have it in words. It is a lease of the whole of the line between *Shrewsbury* and *Stafford*, but it is not connected at all with other lines, although other lines are contained in the leasing Act; and therefore, as between the parties, that Act, no doubt, formed a bond of union between them. But it is not referred to in the agreement which was the consideration for which the parties entered into this contract. Then it is agreed that the following covenants shall form the consideration for withdrawing the opposition, and the bill having been accordingly passed, the contract is entered into; and the first article of that contract is, "that the *Shropshire Union Railways and Canal Company*, or the *London and North Western Railway Company*, shall and will, from time to time and at all times hereafter during the continuance of any such lease," "such lease" being, as I before stated, the lease relating to the *Shrewsbury* and *Stafford* line, and no other—"authorised to be granted by such Act." The contract then is (I need not read it in detail), that, inasmuch as there would be those two lines, which might be competing lines, and might give rise, and would give rise, to a struggle for custom, the one carrying passengers from *Wellington* or *Shrewsbury* to *Rugby*, by *Stafford*, (the *London and North Western Company* having that line by virtue of the contract with the lessors, of whom they were to take part of that line,) the other line being from *Wellington* by *Birmingham* to *Rugby*, there would be those two lines open from *Wellington* to *Rugby*, and a natural consequence would be a competition for the purpose of obtaining traffic for those two lines. Both Companies were most anxious to avoid that which might be injurious to both; and, therefore, they entered into this contract, namely, that accounts should be kept of the traffic—so that there should be no struggle about going by one or the other—but that ac-

counts should be kept of the through traffic which might pass by the one line or the other; and then, having ascertained what that traffic had been, and how far they had travelled upon each of these lines, they agree to divide the profits arising from such traffic, in certain proportions between themselves, 7-13ths to be appropriated to the one, and 6-13ths to the other.

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That is objected to on the ground (I will come to that presently) of its being adverse to the intention of Parliament, and inconsistent with the duties which the directors of those two Companies, or one of them, owed to the public and their constituents. The *London and North Western Railway Company* had the means, to a certain extent, of bringing passengers down to *Wolverhampton* and *Birmingham*, not by means of their line which I have before adverted to, but by means of another line coming down to *Portobello*, which is near to *Wolverhampton*, or coming very near indeed to *Wolverhampton*, and running into *Birmingham*. They had the means of carrying passengers so as to deposit their passengers and goods on the line between *Wellington* and *Rugby*. Therefore, that was not through traffic, but it was the traffic of persons who were desirous of travelling on part of the distance covered by these two lines. The contract, therefore, is, that, with regard to this through traffic, there shall be these two accounts taken, and a prohibition of the *London and North Western Railway Company* from carrying passengers and goods, and depositing them on any portion of the Plaintiffs' line, the Plaintiffs' line terminating at *Wolverhampton*. But, beyond all doubt, though the line from *Wolverhampton* to *Birmingham* had not been completed, that from *Rugby* to *Birmingham* had, and that from *Birmingham* to *Wolverhampton* was in progress; and therefore, they ultimately looked for a clear open line from *Wellington* to *Rugby*. No doubt, if that had not been provided for, the *London and North Western Railway*

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*Company* might have considerably interfered with the traffic on their proper line, though it would have been a considerable deviation from the shortest line of carrying passengers and goods from *Wellington* up to *Gnosal* or *Stafford*, and then down again to *Wolverhampton* and *Birmingham*, which might or might not have succeeded. It was a danger at least, which the Plaintiffs' Company were anxious to guard against; and therefore, provisions were introduced, prohibiting the *London and North Western Railway Company* from doing that which might be so injurious to the Plaintiffs' line.

Having disposed of the ground on which the *Vice-Chancellor* allowed these demurrers, I will advert to the other objections which were referred to in the argument before me. The first was, that this was a fraud on Parliament. Now, I cannot see how such can be at all a fraud on Parliament. The matter was in progress before Parliament; and therefore, the only fraud practised on Parliament, so far as the parties were concerned in passing the leasing bill, had no reference to this arrangement. It was a consideration for withdrawing the opposition to the bill, for their benefit. It cannot be said that parties cannot come to a private arrangement between themselves, as a ground for not opposing a bill. The opposition to a bill must be supposed to be for the purpose of guarding the particular interest of the parties opposing. If these objects be obtained by any private arrangement, it is no fraud on Parliament. Parliament has no longer the duty of protecting the particular interests which are not brought under its consideration; therefore, there is no fraud on Parliament by the party withdrawing his opposition, upon being satisfied, that, by other means, his rights are sufficiently protected. Every land-owner, with whom arrangements are made before parties go to Parliament (which embraces a large proportion of the whole), have their opposition

to the bill neutralised, or destroyed, or withdrawn, in consideration of the arrangements previously made. Therefore, so far as it relates to the particular transaction then in progress, namely, the leasing bill, it does not appear to me to be any violation at all of any duty which the parties owe to Parliament. Still, it may be a breach of contract with the Parliament which passed the earlier bill and granted these powers. Speaking now of the through traffic, what is the effect of this through traffic? That applies as well to the objection made of its being inconsistent with the duties which the parties owed to Parliament, a fraud on Parliament, as to any supposed illegality arising from a breach of duty towards their constituents, or towards the public. Why, the Plaintiffs, having a railway which it was their duty to protect, for the benefit of their constituents, had a very natural anxiety, a very natural dread, that they might be very much injured by so powerful a Company as the *London and North Western Railway Company* having a line in competition with themselves, though not, in point of distance, so convenient; yet, having the power which so large a Company must have (having so great a number of people travelling upon it, and being so much better known) against a minor Company, they had a fear that a great portion of the traffic which they relied on for supplying their line would be withdrawn by another line being opened, having the same termini. Now, their duty to their constituents, that is to say, to their subscribers, was, as far as possible, to secure to themselves, by all lawful means, the largest traffic they could obtain. They were apprehensive that they should lose their traffic; they thought that what they had before calculated on they would be deprived of; but, at all events, if it was a means by which, according to their opinion, the greatest security was preserved to their subscribers of getting a fair and reasonable share of that traffic, how can it be a violation of that duty? It is merely a different mode by which that object

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is secured and obtained. They had a right, and they were bound, to collect all they reasonably could of the fares payable by that traffic between *Wellington* and *Rugby*, that being the line of their railway. They are afraid of being deprived of such traffic, and they therefore enter into the arrangement with the *London and North Western Railway Company*, and say, "We will not compete with each other, which generally ends in the injury of both, but people may travel by which route they please, and we will not interfere to persuade them to go one way or the other. When we have ascertained how many have travelled one way, and how many the other, then we will divide the profits arising from that travelling in certain proportions between ourselves." That was a beneficial arrangement for their own subscribers. Their subscribers cannot complain, the duty of the directors being to obtain the largest traffic they could. Certainly, that must have appeared to them, as it appears to me, and must appear to everybody, a most advantageous arrangement for the minor Company. In point of fact, it is obvious that it was intended as a benefit to them in respect of the consideration emanating from them. They paid for it—they object to the bill passing—they object to the leasing power being vested in the *London and North Western Railway Company*; and then the *London and North Western Railway Company* say, "We will buy you off—we will purchase off your opposition;" and, of course, if they do that, it must be supposed that they meant, and intended to give, and that the other Company intended to receive, some benefit for the consideration so given. It cannot be doubted, therefore, that the Plaintiffs' railway obtained a benefit, in point of amount, beyond what they could naturally reckon on if they had merely taken what fares they might obtain by passengers travelling from *Wellington* to *Wolverhampton* on their small and limited line of railway. Now, if there be no illegality in this course of proceeding, and if the time have arrived at which the contract is to come in-

to operation, the difficulty will be to find the objection to its legality.

The other part of the contract is, that they shall not carry passengers—not on their direct line, but that they shall not carry passengers from *Shrewsbury* to *Gnosal* or to *Stafford*, there being from *Stafford* and from *Gnosal* a line actually existing, and there being another line in contemplation, which might bring the passengers down to *Wolverhampton*, or might bring them on to *Birmingham*. That would be very inconvenient, and a great detour in point of distance, and a much greater extent of line would be traversed than the parties who would have to pass along from *Wellington* to *Wolverhampton*; but still it is possible they might do it. Therefore, it is said, “You shall not do that,” not interfering with their own direct traffic, but only interfering with that indirect traffic which can only be resorted to for the purpose of obtaining from the Plaintiffs that which the Plaintiffs anticipated as the natural result of the line they established. I see no illegality in that. They were under no obligation to carry passengers in that way. They might or might not choose to have an establishment for carrying passengers on that line; but, if it was optional in them, whether they would or would not have the communication, it is quite obvious there would be no illegality in making an arrangement with another Company, by which they abstained from exercising that power.

Then it is said, there is another objection, viz. that this was all in contemplation of that line being continuous and open from *Wellington* to *Rugby*; and no doubt, until the line is entirely open, the contract will operate altogether, or nearly altogether, for the benefit of the Plaintiffs; because, until that line is entirely open, it will of course very much interfere with any traffic from *Wellington* to *Rugby*,

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which the Plaintiffs must have calculated on. If the Plaintiffs reckoned on that line being open, then they, supplying the railway part of that distance, would of course partake of the benefit of that traffic. Then there is a break, and there can be no means of going by railway on the direct line from *Wolverhampton* to *Birmingham*. There is a means of getting on that line by going, not to *Wolverhampton*, but to a station not far from *Wolverhampton*. There is intended to be a *Wolverhampton* station, because the Plaintiffs' line now runs into *Wolverhampton*, and when the line is completed from *Wolverhampton* to *Birmingham*, there will be a continuous line from *Wellington* to *Rugby*, that being of course the line which the Plaintiffs reckoned on when they commenced their proceedings to make the line, and when they entered into this arrangement with the *London and North Western Railway Company*. Then, have the parties provided for that state of things? They have not. They have not said, "This contract shall not take effect till that line is completed;" and for a very good reason, because, if it be not completed, it is not the fault of the Plaintiffs, but the fault of the Defendants, who had the control over the line. The Defendants have undertaken the completion of that line, and it is their duty to complete it. The bill alleges, that they might have done it or ought to have done it. Whether they ought to have done it is not material; but, beyond all doubt, they might have completed the line, and it is now stated to be nearly in a state of completion. However, I do not proceed on that point; there is no such allegation in the bill: but, at all events, it is under their control. It is that which they have undertaken to do; and they cannot be allowed to say, "We have not completed that which we undertook to complete, and therefore your (the Plaintiffs') contract shall not commence or be in operation until we have performed our duty." This appears to me, therefore, an attempt to

exclude the Plaintiffs from the benefit of the contract entered into after the Defendants had obtained a consideration which cannot be returned; for it is impossible to restore the parties to the situation they were in before the contract was entered into, because the Act has passed, and it has now become the law of the land, and they have a competing line established on certain conditions specified, not objectionable, according to my view of the case, nothing of illegality or impropriety on the part of either of the Companies, but a consideration is expressed, of which it is the attempt of the *London and North Western Railway Company* to deprive their opponents, with whom they have entered into that contract.

Then, if anything be wanting to bring the case within the 3rd provision, that the other Companies shall do nothing to the prejudice of the traffic properly belonging to the Plaintiffs' railway, the bill alleges, that they have actually so lowered the tolls for the purpose of benefiting themselves, (for if they had not that competing line, the tolls would not have been lowered) that the Defendants are charging a smaller sum for the longer distance than they charge for the shorter distance. For what purpose is that done? Why, for the purpose of bringing on the Defendants' line passengers who would otherwise travel on the Plaintiffs'; and, consequently, the Defendants must necessarily interfere, on account of the lowness of their tolls, with any traffic that might otherwise flow on to the line of the Plaintiffs. That circumstance shews, therefore, a studious, and anxious, and certainly an intentional injury inflicted on the Plaintiffs' line, to the prejudice of the contract the Defendants had entered into, and obviously for the purpose of creating an injury to the Plaintiffs' line, and by creating an injury, destroying this minor Company, and increasing their own profits. It falls, there-

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fore, most distinctly within the prohibition in the contract which the parties have entered into, of not doing anything to interfere with the traffic properly belonging to the Plaintiffs' line.

Those are the objections made. The breach of the contract is perfectly well established; for, though *Wolverhampton* being on the line, that is to say, the Plaintiffs' line runs to *Wolverhampton*, and the intended line, which is not yet completed, runs from *Wolverhampton* to *Birmingham*, it is quite obvious those two towns are on the line projected for the benefit of the Plaintiffs. What has been done, therefore, is an injury studiously arranged for the purpose of damaging that line. It is in direct violation of the contract which the parties have entered into. The bill alleges, that the Defendants have not kept any account, which it was their duty to do, and that they have carried passengers on the Plaintiffs' line, specifying the fares, which shews the *animus* with which that is done. It appears to me (whatever may become of this case at the hearing), if these facts be established which appear on the face of the bill, that, upon the allegations contained in it, there is a clear case on which the demurrers must be overruled.

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## ADAMS v. THE LONDON AND BLACKWALL RAILWAY COMPANY.

Feb. 13th.

July 4th.

THIS case came before the *Lord Chancellor* upon an appeal from the decision of the Vice-Chancellor *Wigram*, who had overruled a demurrer which the Company had put in to the Plaintiffs' bill, for want of equity.

From the statements in the bill it appeared, that the Plaintiffs were the lessees of some lands at *Stratford-le-Bow*, at a yearly rent of 136*l.*, for a term of sixty-one years from 1845. Part of those lands was required by the Company for the purposes of their railway; and on the 19th of July, 1847, they gave notice to the Plaintiffs of their intention to take that part of their premises. On the 9th of August the Plaintiffs sent in their claim for compensation. The Company afterwards ascertained that the premises which were mentioned in that notice would not be required, and they abandoned it; but on the 8th of November, 1847, they gave a second notice to the Plaintiffs of their intention to take another part of their premises. On the 30th of November, the Plaintiffs sent in their claim for compensation, upon the footing of the second notice, by which they claimed a sum of 766*l.*, and a deduction of 86*l.* a year from the rent of 136*l.* After some negotiation between the parties, an agreement was come to in February, 1848, by which it was arranged that 74*l.* per annum should be deducted from the rent payable by the Plaintiffs under their lease, in respect of the premises which were to be taken from them by the Company, and that 956*l.* should be paid to them for compensation. Afterwards the Company became desirous of taking the remainder of the Plaintiffs' premises, which it was agreed they should

A Railway Company gave notice of their intention to take land, and a claim was sent in which was afterwards abandoned, and repudiated by both parties. The Company then proceeded under the 68th and 85th sects. of the Lands Clauses Consolidation Act, to take possession. The owner of the land might either apply for a mandamus to compel the Company to take steps to summon a jury, or might send in a claim, which, under the 85th sect., the Company must either pay, or summon a jury within twenty-one days; but a bill treating the first notice as constituting a contract, and praying for the specific performance of it, was *held*, upon demurrer, not to be sustainable.

Whether the mere fact of a Company giving

notice of their intention to take lands, such notice not being followed up by any agreement between them and the owner, and no claim being sent in by the owner, gives the Court jurisdiction to compel specific performance of such a contract, although it fixes the lands which the Company are to take,—*quære*.

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do upon procuring for the Plaintiffs other suitable accommodation. This arrangement was not carried into effect; and in June, 1848, the Company repudiated the alleged agreement of February, 1848, and gave to the Plaintiffs a formal notice of their intention to enter upon and take permanent possession of the lands comprised in the second notice to the Plaintiffs, for the purposes of their undertaking. The Company, in pursuance of the Lands Clauses Consolidation Act, 1845, sect. 85, procured a surveyor to be appointed to determine the value of the Plaintiffs' interest; and he estimated the value at 100*l.*, which the Company paid into the Bank of *England* on the 20th of July, 1848, and gave to the Plaintiffs a bond as provided by the Act, and on the same day they entered into possession of the premises. The Plaintiffs insisted that this valuation was founded in error; and that, in consequence of the injury they had sustained, they were entitled to a larger amount of compensation than they had agreed to take in February, 1848. After some further negotiation, the Plaintiffs' solicitor wrote to the Company in October, 1848, requesting them to take the necessary steps for convening a jury to decide the value of the premises. The directors came to a resolution, that the proper course in the present case was to refer the matter to an arbitrator selected by both parties, or if they could not agree upon an arbitrator, then that application should be made to the Board of Trade to have an arbitrator appointed by the Crown. This resolution was communicated by the Company to the Plaintiffs' solicitor on the 24th of January, 1849. On the 2nd of April, 1849, the Plaintiffs filed this bill. It prayed for a declaration that the Company ought forthwith to complete the purchase of the Plaintiffs' estate and interest in the premises comprised in the notice of the 8th of November, 1847, and for a decree that the Company should forthwith take all fit and proper proceedings to determine and settle, according to the provisions of the Lands Clauses Consolidation Act, 1845, the

amount of the purchase-money and compensation to which the Plaintiffs were entitled; and that all necessary directions might be given for that purpose; and that the amount might be paid into Court.

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Mr. Wood and Mr. Bigg, for the Company, in support of the appeal. *Argument.*

The Lands Clauses Consolidation Act provides a clear and sufficient remedy for the Plaintiffs. The usual process of this Court in enforcing specific performance is not adapted for such a case as this; but the Plaintiffs may at once obtain a mandamus to compel the Company to summon a jury. There are not any circumstances which would prevent the Plaintiffs from obtaining ample justice under the provisions of the Act: *The Midland Counties Railway Company v. Oswin* (a). In *Walker v. The Eastern Counties Railway Company* (b), the Court sustained a bill for specific performance; but there the Plaintiff had sent in a claim, and the Company had done nothing further. In this case, however, the claim sent in by the Plaintiffs was afterwards repudiated by both sides. The case must therefore be decided as if no claim had been sent in at all; and the question is, whether, in consequence of the giving of the notice by the Company, this Court can have any original jurisdiction to make such a decree as is asked for by this bill, while the treaty between the parties is in its present imperfect position. If the Plaintiffs wish to have a jury summoned, a mandamus is the proper remedy, and this Court will not compel the Defendants to adopt any other mode of proceeding: *Agar v. Macklew* (c), *Milnes v. Gery* (d), *Gourlay v. The Duke of Somerset* (e), *Wilks v. Davis* (f). The Plaintiffs might also be completely indemnified by an

(a) 1 Coll. 74.

(b) 6 Hare, 594.

(c) 2 S. & S. 418.

(d) 14 Ves. 400.

(e) 19 Ves. 429.

(f) 3 Mer. 507.



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action of damages; and upon that ground the Court would not interfere to compel specific performance: *Dodsley v. Kinnersley* (a).

The *Solicitor-General* and Mr. *Law*, contra.

The notice given by the Company of their intention to take the land, placed the parties in the relative position of vendor and purchaser: *Stone v. The Commercial Railway Company* (b); and one of the incidents to that position, as a general rule, is, that this Court will interfere to enforce specific performance of the contract: *Rex v. The Hungerford Market Company* (c), *Ex parte Hawkins* (d). In *Walker v. The Eastern Counties Railway Company*, it was decided that a party who had received a notice from a Company was entitled to file a bill to compel the purchase of the land comprised in the notice. The Lands Clauses Consolidation Act gives power to the Company to summon a jury, but it does not give any such authority to the owner of the land; and, therefore, when the position of vendor and purchaser is once established between the parties, the ordinary jurisdiction of this Court, in such cases, ought to be applicable. Any new remedy is additional, but will not interfere with the other remedies provided by this Court: *Jones v. Lord Charlemont* (e).

*July 4th.*

*Judgment.*

The LORD CHANCELLOR:—

If, from the terms of the prayer of the bill, and the fact that a demurrer to it has been overruled, it should be inferred that this Court will generally lend its assistance to compel the performance of the provisions of the Acts under which railways are formed and maintained, a proposition would be raised which, if established, would lead to

(a) Amb. 403.

(b) 4 My. & Cr. 122.

(c) 4 B. & Ad. 327.

(d) 13 Sim. 569.

(e) 16 Sim. 271.

consequences of the most serious importance. I do not, however, think that any such inference can fairly be drawn from the decision of Vice-Chancellor *Wigram* in this case, because, on an examination of what fell from his Honor in giving judgment, it will, I think, be found that it turned much upon the special allegations in the bill, constituting, in his Honor's opinion, a statement of fact different from what appears to me to be the true construction of such allegations. His Honor considered the case stated in the bill to amount to this: that the Company had given the second notice, and had not proceeded to summon a jury under the Act; in which case his Honor thought that this Court had jurisdiction to enforce the further proceedings, resting upon the case of *Walker v. The Eastern Counties Railway Company* (a). As I do not consider this to be the true construction of the facts as stated in the bill, I shall abstain from any observations upon the supposed rule of law or the case referred to, and purpose, first, to examine the various allegations of the bill shewing the relative situation of the parties, and then to consider the provisions of the Act of 1845 as applicable to the facts so stated.

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The bill states the first notice and the claim of the Plaintiffs; but that notice was abandoned, and the second notice, of the 8th of November, 1847, substituted for it, upon which the Plaintiffs, according to the provisions of the Act, put in a claim, dated the 30th of November, 1847, claiming 766*l.* and a deduction of 86*l.* from the rent of 136*l.*, which led to a negotiation terminating in an agreement, under which the Plaintiffs were to receive 956*l.* compensation, and have a deduction of 74*l.* from the rent. But this agreement having been afterwards repudiated by both parties, and the bill not praying any relief under it, but adversely to it, it forms no part of the case now existing

(a) 6 Hare, 594.

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between the parties. The bill then, after stating that a negotiation had taken place for the purchase by the Company of other premises, and that they never agreed to an arbitration, and that they repudiated their former claim and were not bound by it, further injury having been sustained, and that the Company had done the same, proceeded to state fruitless negotiation for a settlement by arbitration; that the Plaintiffs ultimately abandoned that course of proceeding, and called upon the Company to take the necessary steps within one month to summon a jury, in order that the question at issue might be decided by them. The bill, having stated a notice dated the 30th of June, 1848, given by the Company for taking possession before payment, under the 85th sect. of the Lands Clauses Consolidation Act, and proceedings accordingly, and possession taken, alleged that the estimated amount of compensation and damage under that proceeding was founded in error, and that the Plaintiffs were entitled to much more, and to a larger amount than their former claims.

From this short abstract it will be seen that the only facts subsisting between the parties, which can affect their rights, are the second notice of the 8th of November, 1847, the notice of the 20th of June, 1848, and the proceedings which followed under the 85th sect. of the Lands Clauses Consolidation Act,—the claim of the Plaintiffs under the second notice, and the agreement which followed it, having, as the bill alleged, been repudiated and abandoned by both parties, and forming no part of the Plaintiffs' case. Such, therefore, are the facts to which the law, which is to be found in the Lands Clauses Consolidation Act, is to be applied. That Act, after providing the means by which the value of the land required by the Company is to be ascertained, by sect. 84 prohibits the Company from taking possession until such value shall have been paid or secured as thereby provided, and by the 89th sect. imposes severe penalties for their taking possession; but by sect. 85,

when a Company are desirous of obtaining possession before any agreement has been entered into, or award made, or verdict given, they are authorised so to take possession upon payment into the Bank of the sum claimed or fixed by a surveyor appointed by two Justices as the value of the property, and giving a bond with sureties for payment of the purchase-money and compensation, to be ascertained under the provisions of the Act; and by the 68th sect., any party entitled to land taken or injured by the Company, for which they have not made satisfaction, is to give notice to the Company, stating his interest in the land, and the compensation he claims, and whether he wishes to proceed by arbitration or before a jury; and, if the latter, the Company are to pay the sums claimed, and enter into an agreement for the purpose, or issue their warrant for a jury, within twenty-one days after the notice, and in default are made liable to pay the compensation claimed, which the party is to recover by action in one of the superior Courts, with costs.

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The *Vice-Chancellor* seems to have considered, that, notwithstanding the provisions of the 68th sect., and the taking possession under the 85th sect., the relative positions of the parties is to be considered as if nothing had taken place beyond the notice of the 8th of November, 1847; and that such notice, having constituted the relation of vendor and purchaser, this Court could enforce the performance of all the incidents to that relationship. It is, I think, quite true, that, to a certain extent, and for certain purposes, the compulsory taking of lands under the Railway Acts places the Companies and the owners in the relative situation of purchasers and vendors; such as fixing, as between them, the lands to be taken, which was all that was decided in *Stone v. The Commercial Railway Company* (a). But it by no means follows, that this Court will

(a) 4 My. & Cr. 122.

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therefore take on itself the specific performance of such sales. If, indeed, the proceedings lead to an agreement, this Court might do so; for then, although originating in the compulsory power, the purchase would have to be effected under a private agreement, and so other cases may arise; but whether this Court would interfere if the case depended entirely upon the notice of taking the lands, not followed by any agreement, or indeed by any claim on the part of the owner,—for such is the present case as stated by the bill,—the amount of purchase-money therefore not being ascertained, is a question upon which I do not think it necessary to express any opinion, because I think that the circumstances of this case call for a decision founded upon very different principles. It was properly observed in argument, that the power of summoning a jury was by the Act given exclusively to the promoters, and that the owner of the lands had no power under the Act of compelling them to do so; and, therefore, the Court's original jurisdiction over contracting parties might be exercised for the purpose of giving to the owner that compensation to which he is, under the Act, entitled, which assumes that such original jurisdiction existed. The fact seems to be, that the legislature, having prohibited the promoters from interfering with the land until the compensation was paid or secured, considered that this afforded a sufficient security to the owner that the promoters would proceed to have the value ascertained by a jury; for this Act adopts a very different course where such pressure would not exist, as under the 68th sect. In the case provided for by that sect., the promoters, being in possession and not having paid the compensation, are not left to their own discretion, or to the pressure of their own wants, to induce them to summon a jury; but a remedy, prompt and effectual, is given to the owner, to compel the Company to do so. He is to make a claim, stating the amount of compensation required; and if the promoters do not enter into an agree-

ment to pay the same, or, within twenty-one days, issue their warrant for a jury, they are to be liable to pay the sum claimed, which may be recovered, with costs, in an action in one of the superior courts. That the situation of the parties is precisely such as contemplated by this 68th sect. appears to me very clear; for I concur with Vice-Chancellor *Wigram* in thinking, that this 68th sect. applies to cases in which possession has been taken under the 85th sect. But, if that be so, the initiative for summoning a jury is not cast upon the promoters, but upon the owner, who is to make his claim, and thereby give the promoters an opportunity of settling his demand without litigation; and the owner has the remedy of having his claim converted into a right, if the promoters shall delay for twenty-one days; and for that right he has a remedy by action. Although an old jurisdiction is not taken away by a new remedy being given, yet, if a new right be given, and a special remedy provided for enforcing it, such remedy must be pursued. Here there is clearly a new right, that is, a right to compensation for land lawfully taken possession of by another under the powers of the Act. A remedy is also clearly given, for the owner has only to make a claim, and he obtains a lawful title to all he claims unless the promoters can reduce it by the verdict of a jury. The *Vice-Chancellor* seems to adopt this view of the case; and if the 68th sect. had been considered by him as regulating the rights of the parties, he would not, I apprehend, have overruled the demurrer. He was, however, of opinion, in conformity with his decision in *Walker v. The Eastern Counties Railway Company*, that the notice of the 8th of November, 1847, having given to this Court jurisdiction, as a contract of purchase, the 68th sect. had not taken it away, but that the owner was at liberty to resort to his position under the notice.

Now, abstaining from expressing any opinion as to the

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effect of that position, in giving this Court jurisdiction when nothing more has been done, I think, that what subsequently took place in the present case essentially altered the position of the parties. The Act does not consider the notice as constituting a contract, but as a preliminary step, bringing the parties together, who are afterwards to settle the matter between them by agreement, arbitration, or the verdict of a jury. In the present case, the notice by the promoters was met by a claim on behalf of the owners, and a regular agreement, according to the statement in the bill, entered into between the parties. So far, the object of the notice of the 8th of November, 1847, had the effect intended by the Act, in procuring from the owners a statement of their claim, and in making an agreement between the parties. But subsequently, this agreement was repudiated by both parties, and the claim abandoned. Under these circumstances, the promoters, finding that no progress was making under the earlier provisions of the Act, resorted to the powers of the 85th sect., which, with the aid of the 68th, was calculated to lead to some settlement. But the Plaintiffs by their bill seek to proceed under the earlier provisions of the Act, and call upon the Court to compel the promoters to issue their warrant for a jury. By the 21st sect. they are only to do this if no claim is made and no agreement come to. But the bill alleges that a claim was made and an agreement concluded. It cannot be that the notice, *per se*, gives the Court jurisdiction. If this were so, the jurisdiction would arise as soon as the notice was given; but at that time three modes of proceeding are open under the Act:—agreement—arbitration—and a jury—the last only, in the event of the two former not taking effect. At the time, therefore, of the notice being given, it is uncertain which course will be adopted; and the Court has, therefore, no guide as to what course it ought to enforce. It is only after the time for an agreement or arbitration has expired, that the jurisdiction to enforce proceedings before

a jury can arise. But that time cannot ever arrive when a valid agreement has been entered into. It appears to me, that what has occurred between these parties takes this case out of the principles of the decision in *Walker v. The Eastern Counties Railway Company*, and that the rights of the parties are to be regulated by the 85th sect., which, with the aid of the 68th, gives to the owner a short and simple remedy for compelling compensation from the promoters, and that he has this remedy in addition to his right to a mandamus, both being remedies much more prompt and efficacious in such a case as this, than a suit in equity, and attended with much less expense.

I am therefore of opinion that the demurrer ought to have been allowed, and I must reverse the order appealed from.

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PADLEY v. THE LINCOLN WATER-WORKS  
 COMPANY.

Jan. 16th.

IN this case exceptions had been taken to the answer of *Thomas Hawksley*, one of the Defendants. The Master held that the answer was sufficient; but the Vice-Chancellor *Knight Bruce* allowed the exceptions, and the Defendant appealed from his Honor's decision.

An arbitrator whose award is impeached on the ground of fraud cannot, by denying the fraud generally, protect himself from answering the interrogatories as to specific facts by which the fraud is alleged to be shewn.

The Plaintiff was a contractor, who had performed certain works for the Company, and *Hawksley* was the en-

The 38th Order of August, 1841, does not protect a Defendant from answering any interrogatories from which he could not previously have protected himself from answering by demurrer.

A contractor filed a bill against a Railway Company and their engineer, whose certificates were to be conclusive as to the amount payable by the Company to the contractor. The bill alleged that the amounts mentioned in the certificates were deficient, and imputed fraud and collusion to the engineer and the Company, and as evidence of the fraud, charged, that certain items were of a specified value:—*Held*, that the engineer could not, by denying fraud generally, protect himself by his character of arbitrator from answering as to the particular items specified.



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gineer of the Company, whose certificate was to determine the amount which the Company were to pay to the Plaintiff. It was provided by the contract, that the contractor should complete the work to the satisfaction of the engineer; and he was to be paid by instalments during the progress of them, as the engineer should think reasonable; and his certificate was in all cases necessary to authorise a payment; and, in case of any doubt, dispute, or difference of opinion, arising respecting the meaning and intention of the contract, or of the specification, such doubt, dispute, or difference of opinion was to be settled and determined by the engineer, whose decision, admeasurements, valuations, and awards were to be final and binding upon all the parties interested therein, and might be made a rule of her Majesty's Court of Queen's Bench accordingly.

While the works were being executed, the engineer required several additions and omissions to be made; and the bill alleged (*a*), that the works which were to be omitted, the prices whereof were fixed by the schedule of prices, amounted to 963*l.* 12*s.* 10*d.*, and that the value of those to which that schedule would not apply, amounted to 70*l.* 19*s.*; that the additional works, the prices whereof could be ascertained by the schedule of prices, amounted to 1275*l.* 3*s.* 11*d.*, and those to which the prices did not apply, to 263*l.* 7*s.* 4½*d.*; that the whole amount due to the Plaintiff was 5003*l.* 19*s.* 4½*d.*, but that the Defendant *Hawksley* had refused to give any certificate as to the value of some of the works as to the price of which the specification was silent.

The bill further stated, that *Hawksley* prepared and signed a certificate in writing, dated the 18th of August, 1848, certifying that the Plaintiff was entitled to receive the sum of 544*l.* 7*s.* 1½*d.* as the final balance due to him

(*a*) The interrogatories to this part of the bill were those which the Defendant declined to answer.

for all the works, and also for all the alterations, deviations, additions, and extra works done under or in pursuance of or arising upon or out of his contract with the directors of the Company. The bill charged, that this was a mere contrivance of the Defendants for the purpose of enabling the Company to avoid paying to the Plaintiff the amount remaining due, and charged as evidence thereof that *Hawksley* had declined to give any certificate of the amount justly due to him by the Company: and it then prayed for an account of the amount due to the Plaintiff from the Company, including the additional works; and that the Company might be ordered to pay what should be found due.

The Defendant *Hawksley* put in his answer, by which he denied any fraud or collusion, and stated, that he had from time to time given certificates to the Complainant, to enable him to receive the sums which, in the judgment of the Defendant, the Complainant was fairly entitled to receive from the Company for the works done and performed by him; and the Defendant had also, at the request and on the requisition of the Complainant, made his final certificate of the sums which, in his judgment or to the best of his belief, the Complainant was entitled to receive; that is to say, after giving credit for the sums already received by him, the sum of 544*l.* 7*s.* 1½*d.*, and which sum the Complainant and his solicitor had, as the Defendant had been informed and believed, refused to accept; and that the Defendant had at all times made his calculations of the amount which the work done by the Complainant ought to be estimated at, and had given his certificates accordingly.

And he further stated, that he had at all times made his calculations in the matters in the said bill mentioned after taking into account all the works done by the Complainant, and had given his certificate accordingly; and he

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denied that he had hitherto refused or declined, or that he did still refuse or decline, to make any estimate of such works. And that he (*Hawksley*) from time to time gave to the Complainant certificates to enable him to receive the full amount due to him from the Company; and that the sums mentioned in all such certificates, except the final certificate, the amount of which the Complainant had refused to receive, had been paid to the Complainant by the Company; and that the Defendant made all the calculations and estimates upon which such certificates were founded, fairly and to the best of his judgment. And he submitted, whether he ought to be required to answer the interrogatories relating to the specific matters which have been before set forth.

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*Argument.*

Mr. Bacon and Mr. Glasse, in support of the appeal.

The Plaintiff contends, that the certificates are erroneous, and he imputes fraud, which the Defendant altogether denies. In order to prove the fraud, the interrogatories ask whether specified works were not of a certain value. But these questions are put to a party who had been selected as an arbitrator to decide upon the value of those works, and who states that he has performed that duty fairly, to the best of his judgment. He ought not, therefore, to be called upon to state the reasons of his award, or the mode, or the calculations by which he arrived at it: *Scougull v. Campbell* (a). In an *Anonymous* case (b), the plea of an arbitrator was allowed; and it was held, that, even if he had made a mistake, and the injured party was entitled to have the award rectified, still he was not entitled to file a bill against the arbitrator: *Lingood v. Croucher* (c), *Steward v. The East India Company* (d).

(a) 1 Chit. 283.

(b) 3 Atk. 644.

(c) 2 Atk. 395.

(d) 2 Vern. 380.

[The LORD CHANCELLOR.—The last case can scarcely be understood. The bill imputed fraud, which the demurrer admitted, and still the demurrer was allowed. That case would not be followed.]

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If the Defendant answered the interrogatories, and shewed that he had made some mistake, still the case would not amount to fraud, and therefore the questions are irrelevant. The Plaintiff must prove his case at the hearing. Under the 38th Order of August, 1841, a Defendant may insist, by answer, that he is not bound to answer any particular interrogatories.

[The LORD CHANCELLOR.—I know this formerly was pretty well understood to be the rule, that a Defendant who had submitted to answer, must answer everything, and most of the Masters acted upon the opinion that they could not enter into the question, whether an interrogatory was material or not. Some thought they might; and, in order to remove that difficulty, an Order was made, giving the Defendant power, by answer, of stating reasons why he did not answer, or declined to answer. But that was confined to those questions which were previously considered immaterial to answer, and which the party might have demurred to; and the Order therefore is, that a party may now, by answer, decline to answer any question from which he might have protected himself by demurrer. In this case, how could the Defendant protect himself from answering these questions by demurrer? If not, he is not within the Order].

Mr. *Wigram* and Mr. *Hallett* appeared for the Plaintiff, but were not called upon.

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The LORD CHANCELLOR:—

*Judgment.*

It appears to me very clearly, that the *Vice-Chancellor* is right, and on this simple ground: it is true that an ar-

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bitrator, if he takes proper means to protect himself, and to clear himself from imputation of fraud, is not bound to state the reasons of his award, because he is the judge; and if he has not deprived himself of that character, he has a right to protect himself under it. But, if any fraud is imputed, he must so frame his defence as to disprove the imputation of fraud: otherwise that takes away the protection which belongs to the character of arbitrator. Here are certain facts alleged to shew improper collusion between him and other parties. It is stated in general terms to be a fraud, and particular facts are alleged as evidence of that fraud. He does not at all protect himself from that charge by denying the result of those facts. He does not protect himself by negativing those facts upon which the fraud is inferred; because, by so doing, he takes upon himself to be the judge in his own case, and to say he is not guilty of a fraud. He may not call it fraud, but the Court may so call it; and as long as those charges are suggested against him, which are alleged to shew the fraud, and until there is an opportunity of trying the whole truth, he cannot refer to the character of arbitrator for the purpose of protection.

Upon the merits, having submitted to answer, I think that he is bound to answer those questions, which are clearly not immaterial for the purpose of the case, as stated by the bill. He admits he cannot decline to answer those questions under the Order, because they are questions as to which he cannot demur; consequently, the Order does him no good. And, anterior to that Order, those questions were not so immaterial that they could have been demurred to; nor could he have protected himself from answering them. Therefore, there is not only the principle of the Court as to arbitrations, but there is the form and rule of the Court, which would compel him to answer those questions.

There being circumstances by which, if they should be

admitted, the Plaintiff contends that the fraud which he imputes, would in some degree be established, I am clearly of opinion, that, as the matter stands upon these pleadings, the Defendant is bound to answer these questions; and the appeal will therefore be dismissed, with costs.

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HOWKINS v. JACKSON.

**T**HIS was an appeal by the Defendant from a decision of the Vice-Chancellor *Knight Bruce*. The Plaintiffs were the executors of *William Howkins*, and the Defendant was *Alfred Jackson*.

*Robert Gibson* the elder, who died in 1823, by his will, dated the 25th of February, 1820, bequeathed a sum of 7000*l.* Three per Cent. Consols, to trustees, upon trust to pay the dividends thereof to his daughter *Anne* during her life, and, after her death, in trust for her child, or children if more than one, equally between them; and the testator gave one-third part of his residuary estate upon the same trusts as were thereinbefore declared of the 7000*l.* Three per Cent. Consols, in favour of his daughter *Anne* and her children.

Shortly after the date of the will, the testator's daughter *Anne* married *T. Hearsey*, who died in January, 1822, leaving *Anne* his widow and one child only of the marriage, *Anne Gibson Hearsey*, who afterwards intermarried with the Defendant, *Jackson*. The testator's will was proved by his widow and his son *Robert Gibson* the younger. In 1830, *Anne Hearsey* intermarried with a second husband, *William Howkins*, and died in January, 1839,

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28th, & 30th.

The husband and administrator of a party who had been entitled for life to the income arising from a share of a testator's residuary estate, and who was himself interested in part of the residue, executed, for valuable consideration, to a party who had become entitled to a portion of the principal, an assignment of all his interest in the testator's estate, mentioning outstanding debts in India generally. And the deed contained mutual general releases. Both of the parties knew that part of the trust property was outstanding, but it was afterward discovered that a sum was due from the executor in respect of assets which he

had misapplied to his own use, and of which neither of the parties to the deed had any knowledge at the time of its execution. The administrator claimed the arrears of interest which accrued due thereon in the lifetime of the party entitled for life:—*Held*, that, as the general words of the assignment were sufficient to pass all the interest of the administrator in the arrears, his claim could not be sustained.

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leaving her husband *Howkins* and her only child, *Anne Gibson Hearsey*, her surviving; and, shortly after her death, *W. Howkins* took out letters of administration to her estate.

The marriage of *Anne Gibson Hearsey* with the Defendant *Jackson* took place in February, 1839, and, by their marriage settlement, part of the property to which she was entitled under the will of her grandfather *Robert Gibson* was settled upon her and her children; and it was thereby stipulated, that any other property to which she was entitled under her grandfather's will, as forming part of his residuary estate, should, after the marriage, be the absolute property of *Jackson* the intended husband.

In 1839, when *Mrs. Howkins* died, part of the testator's estate was still outstanding, in respect of which *W. Howkins*, as administrator of his late wife, was entitled to certain arrears of interest; and it appeared, that part of the sum which had been treated as capital in the accounts on which the marriage settlement of *Mr. and Mrs. Jackson* had proceeded, ought to have been dealt with as arrears of interest due to *Mrs. Howkins's* administrator.

In the meantime, *Jackson* had advanced several sums of money on account of *Howkins*, amounting in the whole to 1547*l.* 16*s.* 2*d.*, or thereabouts.

Under these circumstances, an indenture was executed in November, 1839, and made between *William Howkins* of the one part, and *Alfred Jackson* of the other part, which recited the will, and *Jackson's* marriage settlement, and that there were several errors in the accounts on which the funds in the settlement were calculated, part of the monies having arisen from interest which ought to have been paid to *Howkins* in respect of his wife; and that there was due

to the testator's estate 193,786 sicca rupees, including 7525 for interest; and that certain monies due for rent had been remitted for investment as capital; and that *Jackson* had paid near 2000*l.* for *Howkins*; and that neither *W. Howkins* nor *A. Jackson*, at the date of the settlement, had any knowledge that any part of the Consols mentioned therein consisted of interest or rent, or that any part of the future remittances from *India* would belong to *W. Howkins* in right of his late wife; and that *Howkins* was minded and desirous, and had proposed and agreed to give up and absolutely assign and make over to *Jackson*, for his own use and benefit, all stocks, funds, bank annuities, rupees, dividends, interest, rents, profits, and monies, principal and interest, rights, claims, and demands whatsoever at law or in equity or otherwise, to which he *W. Howkins*, in his marital right, or as administrator of his late wife, then had or could set up or be entitled to in respect of the estate and effects of the testator under his will, or the proceeds, gains, profits, or income thereof, or otherwise produced thereby or therefrom, or in any other manner whatsoever relative thereto; and also, to give *Jackson* the general release thereafter contained. And it was then witnessed, that, in pursuance of the said intention, and to give effect thereto, and in consideration of the premises, and more particularly of *Jackson* having out of his own monies paid or satisfied debts due from *Howkins* to the amount of nearly 2000*l.*, *Howkins* assigned to *Jackson* all and every the stocks, funds, bank annuities, rupees, dividends, interest, rents, profits, and sum and sums of money, principal and interest, and rights, claims, and demands whatsoever at law, in equity, or otherwise, which *Howkins*, either in his marital right, or as administrator of his late wife, then had, or could or might claim, set up, demand, or be in any manner entitled to, from, out of, or upon all or any of the estate and effects of the testator, *R. Gibson*, under or by virtue of his said will, and the proceeds, gains, profits, or

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income thereof, or otherwise produced thereby or therefrom, or in any manner relative thereto, and particularly in, to, from, out of, or upon all and every the stocks and funds, or bank annuities thereinbefore mentioned, and the dividends, interest, and annual proceeds thereof, and the debts or monies, principal or interest then remaining due and uncollected in *India, England*, or elsewhere, and the rents remaining due and uncollected, and thereafter to be, or which ought to be remitted to *England*, and all or any other the property and estate late of the said testator, *R. Gibson*, except the monies comprised in the settlement, to hold the same to *Jackson*, his executors, administrators, and assigns, to and for his and their own absolute use and benefit. And the usual powers were given to *Jackson* to sue for and receive the same in the name of *W. Howkins*; and the deed contained a covenant against incumbrances, and for further assurance, and also mutual general releases.

Subsequently to the execution of the deed, namely, at the beginning of the year 1842, it was discovered that, in May, 1825, *R. Gibson* the younger had applied to his own use a sum of 12,000*l.*, part of a sum of 15,000*l.* constituting a portion of the testator's estate, which had been deposited in the *Hindustan Bank*, and had not included it in the accounts rendered by him in 1838; and none of the parties to the marriage settlement were aware of it. It was admitted by *R. Gibson* the younger, that one-third of the principal sum of 15,000*l.*, and of the interest, amounting to 3400*l.*, were due from him to the parties entitled to Mrs. *Howkins's* share of the testator's residuary estate, and he executed a mortgage to secure the payment of it. But *Howkins* contended, that, as administrator of his late wife, he was entitled to the interest on one-third part of that 15,000*l.* from 1825 to 1839, when his wife died; and he claimed a sum of 2733*l.* 6*s.* 8*d.* on that account. This claim was not admitted by *Jackson*; and in June, 1846, *W. Howkins* died,

having by his will appointed the Plaintiffs his executors. They instituted the present suit praying for a declaration that the sum of 2733*l.* 6*s.* 8*d.*, or whatever was due to *W. Howkins* for interest in respect of one-third part of the money, was not intended to be assigned, and was not in equity assigned to the Defendant *A. Jackson* by the indenture of November, 1839, and that the Plaintiffs were entitled thereto, notwithstanding such indenture; and also that it might be declared, that such indenture operated merely as a security for what might be due from *W. Howkins* to the Defendant, and that the Defendant was a trustee of the surplus; and for an account and payment.

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HOWKINS  
v.  
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Statement.

The Defendant insisted, that the deed of the 11th of November, 1839, was intended to be and was in fact an absolute sale to him of all the interest of *W. Howkins* in right of his wife under the will of *R. Gibson* the elder. The Vice-Chancellor *Knight Bruce* held, that those arrears of interest did not pass by the deed of November, 1839, and that the Plaintiffs were entitled to it in equity.

Mr. *James Russell* and Mr. *Cole* appeared for the Plaintiffs, and insisted that the deed was intended to carry out the intention which the parties had formed upon the degree of information which they then possessed respecting the property affected by it; that *Howkins* never proposed to give up his interest in this particular sum of 15,000*l.*, of which he knew nothing, and the Defendant being equally ignorant of it, never contracted to obtain any interest in it. They cited *The Marquis of Exeter v. The Marchioness of Exeter* (a), *Butcher v. Butcher* (b), *Simons v. Johnson* (c), *Lindo v. Lindo* (d), *Solly v. Forbes* (e), and *Ramsden v. Hylton* (f).

Argument.

(a) 3 My. & Cr. 321.

(b) 1 New Rep. 113.

(c) 3 B. & Ad. 175.

(d) 1 Beav. 496.

(e) 2 Brod. & B. 38.

(f) 2 Ves. sen. 310.

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Howkins  
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—  
*Argument.*

Mr. *Bethell*, Mr. *Bacon*, and Mr. *Shadwell*, for the Appellant, contended, that the case raised by the bill was, that the deed was intended to operate as a security only, and not as an absolute assignment. The cases which were cited were chiefly cases of releases, and established the proposition, that where the operative part of a deed went beyond the intention, as shewn by the recitals, the Court would cut down the effect of the deed, so as to make it consistent with the recitals. But the recitals in this deed shewed an intention to assign all *Howkins's* interest in every part of the testator's estate, and the subsequent discovery of an additional item in that estate was no reason for upsetting the deed.

Mr. *Cole* replied.

*Judgment.*

The LORD CHANCELLOR said, that he thought the decree below could not be supported. The suit was not instituted to correct the deed, but the object of it was to obtain a declaration, not merely that a particular sum of which the parties were ignorant, but that all the property comprised in the deed was assigned by way of security only for the monies which the Defendant could claim from the Plaintiffs. The bill did not allege that the deed was executed under any circumstances of fraud or misstatement, or that the language of the deed was more extensive or different from what it was intended to be. The observations of Lord *Eldon* in *Beaumont v. Bramley* (a) were applicable, that, where a mistake appeared on the face of the deed, as, for instance, the operative part being inconsistent with the recitals, there the Court acted without difficulty; but, in other cases, such an attempt was seldom successful. But that was not the object of this suit. The recitals stated the intentions of the parties, and

(a) T. & R. 52.

the operative part was quite consistent with them, and no relief was asked for upon the ground that the deed ought to be corrected.

1860.  
 HOWKINS  
 v.  
 JACKSON.  
 Judgment.

His Lordship then stated the circumstances of the case, and said that the real question in the cause was, whether the property which had been left in *India*, and which was in the hands of the personal representative, did or did not pass by the deed, the parties not being aware of the existence of that particular sum of money. It appeared, upon looking at the deed, that it recited the particulars of various sums which formed part of the testator's estate, and then *Howkins*, in consideration of all the circumstances and of the payments made by *Jackson*, gave up to *Jackson* all his claim as personal representative of his late wife, and executed a general release in the most comprehensive terms. It was known that some property was outstanding and was likely to come from *India*, but the parties had not any knowledge of this particular fund. Under these circumstances *Howkins* executed an assignment of all his interest in any funds derived from the testator *R. Gibson*. That shewed an intention to make an assignment of all the property without knowing the particulars of which it consisted. This property clearly passed by the deed, and no case was raised why the Court should interfere to take it out of the operation of the instrument. It was true that the parties had no intention of passing this particular property, because they did not know of its existence: but there was a general intention to pass all the property, of which this particular fund formed a part.

His Lordship therefore considered that the only decree which the Court could make, must be to reverse the decision of the *Vice-Chancellor*, and dismiss the bill, with costs.

1849.

Nov. 14th,  
16th, 17th,  
19th, 20th, &  
26th.

*P. A. L.* was engaged in a speculation in *New South Wales*, in partnership with *M.* and three other persons, *M.* being interested as executor of a deceased partner. *M.* and one *F.* were the *London* agents of the concern. In 1830, *P. A. L.* became bankrupt, being at the time indebted to the partnership concern for advances made in respect of his share.

He disputed the commission, and the concern being brought into a state of great embarrassment and difficulty by his circumstances and conduct, a deed was executed in August, 1829, whereby *P. A. L.* assigned his share to *M.* and *F.* in trust to secure the amount due from him to the concern, and subject thereto in trust for *P. A. L.*; and *P. A. L.* covenanted not to interfere in the control or management of the concern. In December, 1831, *P. A. L.* (his commission still existing) agreed, with the assistance of solicitors acting on his behalf, to release his interest to his partners, in consideration of 250*l.*, but the completion of this contract was deferred by reason of the *superedeas* not having been obtained. *P. A. L.* afterwards received 50*l.* on account of the 250*l.*, and otherwise recognised the agreement. The agreement was, on the 2nd of May, 1836, and at his request, completed, without the intervention of any professional person on his behalf, and no further accounts and explanation appeared to have been furnished him. In May, 1839, having obtained an assignment of his interest from his assignees, he filed a bill to set aside the deeds of August, 1829, and May, 1836, on the grounds of fraud, misrepresentation, concealment, and the gross inadequacy of the consideration; but the Court dismissed the bill with costs,—holding that the transactions were in themselves unobjectionable, and were dealings with the property which were not connected with any trusts between the parties, and were not to be regarded as a purchase of trust-property by trustees for their own advantage, and consequently open to be impeached in a court of equity.

## KNIGHT v. MARJORIBANKS.

THIS was an appeal by the Plaintiff from a decision of the *Master of the Rolls*, which is reported in 11 Beav. 322.

Mr. Elderton, Mr. J. V. Prior, and Sir F. C. Knowles, appeared for the Plaintiff.

Mr. Turner, Mr. R. Palmer, and Mr. Cotton, supported the decree.

In addition to the authorities cited in the Court below, the following were referred to: *The Earl of Chesterfield v. Janssen* (a), *Stratford v. Bosworth* (b), *Crowe v. Ballard* (c), *Ex parte Lacey* (d), *Ex parte Bennett* (e), *Huddleston v. Briscoe* (f), *Crawshay v. Collins* (g), *Montesquieu v. Sandys* (h), *Evans v. Llewellyn* (i), *Burton v. Wookey* (k), *Cane v. Lord Allen* (l), *Hickes v. Cooke* (m), *Cook v. Colling-*

- (a) 2 Ves. sen. 125.
- (b) 2 V. & B. 341.
- (c) 1 Ves. jun. 215.
- (d) 6 Ves. 625.
- (e) 10 Ves. 381.
- (f) 11 Ves. 583.

- (g) 15 Ves. 218.
- (h) 18 Ves. 302.
- (i) 1 Cox, 333.
- (k) 6 Madd. 367.
- (l) 2 Dow, 289.
- (m) 4 Id. 16.

*ridge* (a), *Fox v. Mackreth* (b), *Wilde v. Gibson* (c), and  
*In re Bloye's Trust* (d).

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BANKS.

The LORD CHANCELLOR:—

Nov. 26th.

Judgment.

I have no recollection of ever seeing a case so oppressed and incumbered with irrelevant matter as will be found in this case. There is a mass of paper which it is extremely difficult to look through, to the extent of rejecting what is immaterial, without very great labour: but that being done, the chaff being rejected, there remains comparatively little in the case, and that producing no difficulty whatever in coming to a result.

The simple facts of the case are, that several persons, being embarked together in an adventure of cultivating a large tract of land in *Van Diemen's Land*, enter into an arrangement among themselves, by which they are to advance certain stipulated sums, and all such other sums as may be necessary for carrying on the adventure. The object was to bring a piece of uncultivated land into cultivation, and by feeding sheep, cattle, and horses, to endeavour to turn this property to the benefit and advantage of the parties; and, as may be supposed, the money proposed originally to be advanced, fell very far short of what was required, and of course the parties engaged in this speculation, not only for their own benefit, in order to preserve the property, but as a duty between one another, were bound to find the money that was necessary for the purpose of carrying on the adventure. And it appears, that in the year 1829 the money which ought to have been advanced by Colonel *Lautour*, but which he had

(a) Jac. 607.

(c) 1 H. L. Ca. 605.

(b) 2 Bro. C. C. 400.

(d) Ante, p. 140.

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—  
*Judgment.*

not advanced, and which therefore constituted a debt as between him and the others, and which they must have furnished, as the means of carrying on the adventure, for want of the proper instalments, amounted to 2413*l.*, and it was quite obvious that this could not go on. If four or five gentlemen join together in an adventure, for the express purpose of entering into a speculation, and one of them keeps back, and does not pay the instalments due, it is in fact compelling the others to advance the money on his behalf. The adventure must go on, or the whole thing must be ruined if the money is not found ; and if one man does not find the money for the purpose, it must be found by the others, he being bound under the covenant to make the necessary advances. Now, that this arrangement is matter of complaint, which is carried into effect by a deed of the 4th of August, 1829, must be wondered at, because an act of greater liberality and kindness on the part of those who joined in it towards Colonel *Lautour*, who ought to have made the advances, can hardly be conceived. Instead of making payment of the 2413*l.*, which was what he owed at that time, he represents to them that he would pay 1400*l.* in a very short time, and they are content to take security for 1000*l.* The 1400*l.* was not paid, but it appears that 1000*l.* was paid ; the security therefore stood for the sum of 1000*l.* on the face of it, that appearing to be the amount of debt at that time due ; and the other 1413*l.* was left on the assurance that he would make that payment at a certain time, and the very next month of September was the time fixed for that payment. Now, it can hardly be supposed that 1000*l.*, part of the 1400*l.*, having been paid, and the 400*l.* having been left unpaid, this bill is filed in which the Plaintiff represents that the 1000*l.* paid in September, was the 1000*l.* that was secured by the deed of the 4th of August, 1829, a fact that could not be matter of mistake or forgetfulness.

The Plaintiff files the bill making that statement, of necessity knowing it to be false : it is highly discreditable to those who are parties to it. It is the greatest folly in the world to suppose that he did not recollect it. It is admitted, and it is not now in question at all, that the 1000*l.* paid in September was not the 1000*l.* which was secured, but the 1000*l.* which was left out of the security upon the faith of his promise of payment in the following month of September.

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 Judgment.

But how is this deed of the 4th of August, 1829, impeached? For that is the first part of the prayer of the bill. It is impeached on the bill, but without foundation. It is a security for 1000*l.*, and 1000*l.* has been paid, and according to the bill there is nothing due on the security; but the security is made the foundation of future transactions, and if that transaction could be so impeached, no doubt it might go a great way towards impeaching the second transaction, because it is the very foundation of it. But the ground wholly and entirely fails. The effect of that security is very simple, and perfectly free from any objection; and it is singular, as was observed by the *Master of the Rolls*, and at the bar, that the only circumstances connected with that deed, which now at the bar are matter of complaint, are entirely omitted from the bill: that is, taking it merely as a security for 1000*l.*, which the partners were willing should remain on the security of Colonel *Lautour's* interest and share in this adventure. It was simply an assignment of his interest and share in this adventure to two persons, *Marjoribanks* and *Ferrers*, who were the partners, upon trust to sell, and to pay what was due, and to pay the surplus to the proprietor, Colonel *Lautour*. That trust was never put in operation at all. It was in the power, no doubt, of *Marjoribanks & Co.*, to sell and pay the mortgage debt, but it never was acted upon. That deed also (and this is the part now relied on, but entirely



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omitted from the statements in the bill) contains a stipulation providing for the non-interference of Colonel *Lautour* during the pendency of the security, in the management of the property. Colonel *Lautour* says, that if he had not at that time the means of advancing what ought to have been advanced by him for the purposes of the estate, there would have been his share of interest as the future means of paying not only what was then due, but what might thereafter become due. The object of the deed was to secure the 1000*l.* due, and such payments as he would, according to the covenants, be liable to pay in future, contemplating, and very naturally contemplating, from the situation he was in, that he most likely would not be able to pay, and certainly could not then pay the future instalments that might become due; and therefore, to secure themselves out of his share in the adventure, such sum as not only would be due, that is to say, 1000*l.*, but such sums as might thereafter become due from him to them on account of the advances required for the estate. If they were to look to his share, they certainly had not only an interest, but they had a duty to themselves and to the concern, to see that that share was not exposed to the waste and improper treatment which it might be expected to receive from the hands of Colonel *Lautour*, considering the situation in which he was placed. They were not likely, therefore, to leave the management of so extensive a concern as this in the hands of a man capable of acting so prejudicially with regard to its future progress; and therefore, they provide means by which he shall be prevented from, in fact, interfering in the management of the estate, and destroying the security which, out of kindness to him, they agreed to take. Now, he was in that situation. It was a contract of partnership: a contract for their mutual benefit. The conditions were to be performed by those who claimed the benefit of it. His past conduct shewed that Colonel *Lautour* had no such intention

of performing them, and that his means had entirely failed; and, by the terms of the deed, he had also failed in performing that part of the agreement. Instead of availing themselves of that circumstance in order to get rid of him altogether, they, out of kindness, I suppose, to him,—and we can conceive no other purpose, for they could not look to him for contributing to the future expenses which were to be paid,—in order to enable him, at some future time, to resume his position in the concern, agreed to take this security instead of demanding payment, to take the security for what was due, and also a security for the sums which he ought to advance for the future management of the concern. I am clearly of opinion, therefore, not only that those covenants were perfectly correct and consistent with the relative situation of the parties, but that it is quite immaterial for the present purpose, (that not being stated in the bill,) and it is impossible for the Plaintiff to rely upon it, or to say that this was not a very proper and judicious provision, and a provision which they would have a right to have recourse to. The thing went on. He, however, by this deed, is by no means prohibited or interfered with as to any knowledge he might have required: he had a full right to investigate all the accounts, and see the letters, and there is nothing at all to interfere with his right as partner, except in those particular instances in which it was thought desirable that he should not be permitted to interfere with the proceeding of the concern.

Matters, however, went on; and, in the year 1831, it appears that the debt had increased from what it was in August, 1829. The debt, in November, 1831, amounted to 3500*l.*; and then a contract was made, which was not sought to be impeached, for a release of his equity of redemption for a certain sum. The whole stress of the case rests on that transaction. Every species of imputation is

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thrown into the bill which could possibly invalidate the contract: that not only was he without any knowledge of the value, which knowledge of the value was possessed by the other partners, but that it was fraudulently concealed from him; whereas it turns out on the evidence, that this was the history of that transaction:—that Mr. *Gale* being applied to by Colonel *Lautour* to advance some money, employed Messrs. *Nind & Cotterill* as his solicitors, and they found he had no such interest in this concern as they thought would give a reasonable security to any person advancing money upon it; and then, having so come into communication with Messrs. *Nind & Cotterill*, as solicitors for Mr. *Gale*, they acted for him. Now, about that there can be no doubt. Mr. *Cotterill* not only writes letters, but Mr. *Cotterill's* own evidence shews it. It was thought desirable by Colonel *Lautour*, or by Messrs. *Nind & Cotterill*, or by Mr. *Cotterill*, whom he consulted, and whom, for that purpose, he made his solicitor, that it was very desirable to get rid of this concern and do all he could beyond the debt due in releasing all his interest in the concern. The original proposition of dealing in that manner with the other partners came from Colonel *Lautour* himself, through his attorney; and it is, of itself, rather a strong fact when fraud and improper dealing are imputed to parties in obtaining from him a release of the equity of redemption, that the offer came not from them, but from him. The debt, after some negotiation, was found to amount to 3500*l.* What was his interest beyond the debt actually due? If the debt actually due amounted to the whole value of his interest, then, of course, as a matter of pecuniary calculation, his interest was nothing; and he was well off in being permitted to retire from the concern, they releasing him from any personal obligation that he was under. He, however, asked a sum of money: it was refused; but, after some negotiation, it was agreed that 250*l.* should be given to him beyond the debt then

due on the security: and, on the 5th of December, 1831, Mr. *Cotterill*, acting for him and as his attorney, wrote to Messrs. *Freshfield*, accepting the 250*l.* which had been offered by them on behalf of their clients. But then they say, that the matter cannot be completed till Colonel *Lautour* gets his *supersedeas*: he had become bankrupt, and he had not got his *supersedeas*. Difficulties arose in doing that: he could not do so at that moment; and therefore they themselves, *Nind & Cotterill*, acting for Colonel *Lautour*, concur in the amount to be paid; but they themselves say, that it cannot be completed till he gets his *supersedeas*, which, it seemed to be expected, would not long be delayed. Accordingly, a deed was prepared on the 6th of December, 1831, the day after the acceptance of the terms offered, and was sent to Messrs. *Nind & Cotterill*, for the purpose of being approved on behalf of Colonel *Lautour*. That deed being so prepared and so sent, was not actually executed: there were some alterations required; and the deed was not executed till May, 1836. Then it was executed under circumstances which I shall presently have occasion to refer to.

Now, this transaction of 1831 is not impeached at all; it is not impeached as a contract—the deed carrying it into effect is impeached, but, as a contract, it is not impeached. But, however, the arguments which might have been used against the contract are brought into action as against the deed; and it may be said, therefore, that the transaction is impeached, although the agreement, the foundation of the transaction, is not impeached.

Now, the first argument is that on which the whole hinges, because, if that argument does not prevail, none of the other circumstances can at all be applicable to the transaction—namely, that this is a transaction between trustee and *cestui que trust*. It is not contended that a trus-

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tee cannot bind a *cestui que trust*; but it is said, there are certain duties and obligations imposed by the rule in equity on a trustee so dealing, which, it is said, have not been observed by those who agreed to purchase Colonel *Lautour's* interest; and therefore, it is said that that relative situation of trustee and *cestui que trust* being in existence, circumstances are brought to bear on the contract then entered into, which of course would have no bearing on it at all, unless that relative situation be first established. Now, let us see what the relative situation was. Mr. *Marjoribanks*, it is true, had a share in the concern, whether in his own right or not does not appear. He was interested in the concern. That, however, was a totally distinct character, because there are different characters in the business. He was not only originally the broker and manager of this estate, but he and his partner, Mr. *Ferrers*, are the parties to whom the property was conveyed; but for what purpose? On trust to sell. Why, it is true, that, if the sale of the estate had taken place, the parties who were in the actual execution of the trust would be affected by all the equities which protect *cestuis que trust* against the acts of the trustees. What are those equities? You are bound to procure the best price that you can for the property. You shall not surreptitiously, and without the knowledge of the *cestui que trust*, bid at an auction in your own name or by anybody else, because your duty is inconsistent with your interest. Your duty is to obtain the best price that you can, and the law will not permit you to put yourself in the situation of having an interest inconsistent with your duty. You cannot be recognised as a purchaser at the lowest price, which you, as a purchaser, wish to give. You cannot put yourself in that situation, it being your duty, as a trustee, to obtain the highest price. That is the rule in the case of a trustee; it is always to protect the due execution of the duty which the trustee takes upon himself to perform; but if something else takes place uncon-

nected with the trust, then the circumstance of his undertaking a trust not acted upon can create no impediment in such other dealings, provided such other dealings have nothing in themselves objectionable.

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This I slightly threw out in the course of the argument, and I did not receive any satisfactory answer. I had a strong impression and a recollection of a distinction being taken. I find it is not only taken, but taken so long ago as Lord *Hardwicke's* time, and has been acted upon from that time to the present. Sir *Edward Sugden*, in the third volume of *Vendors and Purchasers*, p. 227, in speaking of the rule, that a trustee cannot purchase from a *cestui que trust*, says, "The rule has never been applied to a purchase by mortgagee from the mortgagor, and it is to be hoped that it never will." Then he refers to a case of *Webb v. Rorke*(a), which is the strongest case against such a transaction; and he excepts this very case from the rule which he is laying down very broadly: that is the case of holding that the mortgagee could not take a release from his mortgagor, because they were not on an equal footing—one was under the pressure of debt, and the other had all the influence which a creditor had over his debtor. Sir *Edward Sugden*, in laying down the doctrine, not approving of that, with all the inclination which he shews to carry the rule as far as possible, makes the exception of a mortgagor and mortgagee. He says, there must be misconduct to impeach that transaction; and then he goes on, in page 228, to say, that a sale by a mortgagor to his mortgagee stands on the same principle as to proof, and the question of value is immaterial. Now, I do not think it at all necessary to express any opinion on that matter, which is not at this moment before me. It shews that Lord *Redesdale*, when he was enforcing the rule, and carrying it further than it

(a) 2 Sch. & Lef. 673.

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was ever carried before, in setting aside a transaction between *cestui que trust* and trustee, thought it necessary to except the case of mortgagor and mortgagee. Certainly, there may be no power to sell; but a power to sell not acted on can make no difference.

One party having the estate and the other having a charge upon it, they may deal with it, because there is no other interest in the estate but that of the party whose property it was, and the interest of the party who has a claim by way of lien on the property. How very strong that is! But what is to become of it, as between mortgagor and mortgagee, if a man who has mortgaged his estate is not to be permitted to get rid of the debt by releasing the equity of redemption. If you consider a mortgagee a trustee for that purpose, there is no other person he can deal with; and the rule, therefore, applicable between trustee and *cestui que trust*, as applied to a case of mortgagor and mortgagee, would make it impossible for a mortgagor ever to get rid of his debt by releasing the equity of redemption. The consequence is so monstrous, that it shews how untenable the proposition is, to endeavour to extend that construction to a transaction between mortgagor and mortgagee. It was so felt by Lord *Redesdale*, and it is distinctly expressed by Sir *Edward Sugden*, that he trusts the time never will come when the doctrine shall be extended to mortgagor and mortgagee. It cannot be necessary to say anything further on that subject. Then, here is a transaction not at all connected with the trusteeship. It is true, the legal estate is in *Marjoribanks*, which is nothing at all to the purpose. They are dealing, not with the subject of the contract of 1831; they are dealing with that which is not the subject of the trust to sell; they are dealing, not for selling to third persons,—not therefore requiring any assistance from the party who is authorised to sell,—not looking to *Mar-*

*joribanks & Co.* as persons whose duty it was to obtain the best price, but it was directly between the owner of the estate and the party having a lien upon the estate, to settle among themselves what the amount of the debt was, and agree upon it. Now that is, like every other transaction, open to be impeached if you can shew fraud, but it is not a case of what we may call a species of fraud as between trustee and *cestui que trust*, but of that species of fraud which my Lord *Rodesdale* alludes to, which may set aside a transaction between vendors and purchasers.

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Then you must shew that there was either misrepresentation or suppression of that which the party was bound to communicate. In short, you must shew such a case as would have impeached the transaction, if it had taken place in the ordinary manner between parties who were strangers to each other. Now, we will just look at the question of value. Here is property of such a nature that, as to any question of its value, or as to the particular period at which it would become valuable, nothing could be more speculative to those who have entered into such a concern. At one time, not only it was not of any value, but it was a *damnosa hereditas*, that which the parties would be extremely glad to get rid of if they possibly could, probably without receiving what they had previously advanced. It seems to have been so in 1831, when this contract with Colonel *Lautour* was made. Do Colonel *Lautour's* assignees consider it valuable property? Do they take it for the benefit of creditors? Not at all: they are glad enough to get rid of it: they hand it over to Colonel *Lautour* himself, and Colonel *Lautour* enters into the contract, because he considered it as a property not producing, or likely to produce, any profit for his own benefit. Another thing is, that Colonel *Gibbs*, who had also a share in the adventure, and who owed less money than Colonel *Lautour* owed, was very glad to get rid of his share



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merely by cancelling the debt due to him, which, I think, was near 3500*l.*: in a concern which owed him 3500*l.*, he was very glad to get rid of his share by merely cancelling his debt. Now, I consider those two facts,—for those are facts and not matters of opinion,—are of great importance. After one of the parties, Colonel *Gibbs*, had the fullest information, he satisfied himself at that time that the property was not worth anything; and, therefore, he was very glad to get rid of it on the mere cancellation of the money he had advanced. The assignees thought it was worth nothing, and they did not think proper to claim it, but handed it over to Colonel *Lautour*. Then why am I to suppose that a much larger sum than Colonel *Lautour* owed to the concern, left anything of value to be received by him over and above the debt which was due from him to his partners? The presumption from those facts is, and those facts are worth a great deal more than any speculative valuation that may be put on it by parties under different circumstances, that the property was then of no value. Circumstances have arisen, which perhaps they could not have anticipated; but the mere calculation of the property as to the ultimate value of it, was purely speculative. However, it appears to me that this matter must be looked at as it existed in the year 1831. At that time, although Colonel *Lautour* had not dominion over the property, yet he thought proper to deal with it prospectively, expecting to be put into possession by means of a *supersedeas*. He was ultimately put into possession by those means, but expecting to be put into possession of this property, he dealt with it in 1831; and that contract never having been cancelled, but being recognised by all parties, particularly by the Plaintiff, as a binding contract up to the year 1836, when it was carried into effect, the fairness or unfairness of the transaction should be judged of by what existed at that time in the year 1831. It became, therefore, comparatively immaterial to consider

what took place between that time and the month of May, 1836, when it was ultimately completed.

The only evidence of the fraud, as it is called, is—the only attempt made to prove it is—that the parties here, the other partners, had information from time to time, which they received, or which they had before, which Colonel *Lautour* did not possess, and that they did not communicate that information to him. If the rule laid down by Lord *Redesdale* and Sir *Edward Sugden* is correct, that would not at all impeach the transaction; because, if they are to be looked on as strangers, they are not bound to tell the party every circumstance that entered into their calculation in estimating the probable ultimate value. The case resolves itself into this:—he had access to every document, or he might have had it if he thought fit; he was not prohibited from having such access; he had the knowledge, and I have not the least doubt, as the *Master of the Rolls* says, that he had more knowledge of the actual condition of the property in *Van Diemen's Land* than his partners had. He was in active communication with all those who were there, and he had proposed himself to go there to superintend and see what he could make of the property. He had many correspondents there, and there is no reason to suppose that everything relating to the property was not at least as well known to him as it could have been to his partners. What, then, was his own conduct? He entered into this contract in 1831: he continued to act on it till 1836, when he completed the transaction by the execution of that deed; and there appears to be no complaint made on the subject till 1839; and in 1839 he says he was able for the first time to take active proceedings; he was not able to file his bill till 1839. But where is the remonstrance? When is it that he communicates to the other parties that he is deceived? Up to the time of receiving the 250*l.* we do not hear a single

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 ———  
*Judgment.*

word of complaint; but he continues from 1831 to 1836 to press for the completion of the contract. He could not enforce it, because he had not got his *supersedeas*, and had not the power of dealing with the property. But from the indulgence of those who had, he does get an advance on account, of 50*l.*, and letter after letter comes, not only not complaining of the contract of 1831, but pressing for its completion, or rather, anticipating the payments upon it. He ultimately gets the transaction completed in 1836, for he could not give any effective title to the Defendants, for he had not got the property before that time. He does not complete it till 1836, and he gets payment of the 250*l.* So that here, five years after the contract made, the delay not arising from his opponents, but arising from his default, because he had not got rid of the incumbrance of the bankruptcy, the delay arising from circumstances connected with his position, and not with any act of theirs, he continues to act on the contract, and presses on them the completion of it, and when he gets the 250*l.*, in 1839 he files the bill to set the whole transaction aside. Was he all that time without any information? Had he anything which he had not in 1831? Could he not have obtained that information before 1836?

Now, of actual fraud, that is to say, what would be called fraud between A. and B. as strangers, I do not find any allegation. There is allegation enough of want of communication, which would have a material effect if the relation of trustee and *cestui que trust* was established. But if there was any such allegation in the bill,—and I cannot undertake to say that there is no such allegation,—it would take a large portion of the week to read through the bill,—I have heard some suggested, but suppose there were, I have looked at the proofs, and I find no proof of anything like fraud. I think, therefore, that the case as proved establishes no case whatever of

fraud, and no want of communication of anything which the parties were bound to communicate, but a very considerate indulgent treatment by solvent partners to one of their members who had become insolvent, and who had entered into this contract; and I find a deliberate release—a contract to release the equity of redemption in 1831—by the insolvent partner, under the advice of the solicitors who were at that time acting for him, and that acted upon, and not complained of, from that time till the year 1839, and completed by the execution of the deed in 1836. But this is a bill which professes to proceed upon the positive allegation of fraud, the proof of which entirely fails. I think on every part he has failed, and I see nothing in this case, whatever may be the form or shape of the proceedings, to entitle him to a decree; and therefore, I think this appeal must be dismissed, with costs.

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Judgment.

MARKS v. SOLOMONS.

THIS was a suit for the administration of the estate of *George Joel*. By his will, dated the 20th of November, 1845, he bequeathed as follows:—

“I give, bequeath, and dispose, after payment of my just debts and testamentary expenses, as follows:—that is to say, unto my wife, *Mary Joel*, the sum of 100*l*, to be paid to her forthwith, together with my watch and all my household furniture, plate, linen, china, wearing apparel, and books, which shall be on my premises and in my possession at the time of my decease, to be for her

1850.  
*Jan. 31st.*  
*Feb. 1st.*

A testator bequeathed to his wife absolutely 100*l*, his household furniture, &c., and then bequeathed to her the interest of monies invested by him in certain Loan Societies, and all his other property, during her life. He afterwards bequeathed all monies belonging to him in a Friendly Society, and in all

other Societies, to his wife absolutely:—*Held*, that the expression “all other Societies *ejusdem generis* with that which had been just mentioned; and that, as to the money payable by the Loan Societies, the widow took a life interest only in them.

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 —  
*Statement.*

own use and at her own disposal. And I hereby also bequeath the interest of all monies invested by me in different *Loan Societies*, as follows:—in the *Hand in Hand Loan Society*, held at the *Paul Pindar* public house, *Bishopsgate-street*, in the *City of London*; the *Commercial Tradesman's Loan Society*, *Aldersgate-street*; and also in the *Crown Loan Society*, *Crown-street, Finsbury*, likewise, as well as all other property of every nature and kind whatsoever and wheresoever, during her life. And I direct that all my stock in trade be sold by public auction forthwith after my decease; and all my book-debts and securities for money, of every sort or kind, be got in and collected as soon as possible, and the same from time to time, together with the produce of the said sale by auction. And that the produce thereof, together with the money that may be standing in my name at my banker's at the time of my decease, be placed out at interest in the *Bank of England* by my executors, hereafter named, for the benefit of my said wife, *Mary Joel*, as aforesaid, during her life, together with the said other interest, and all monies so invested at the said *Loan Societies* to be paid to her quarterly. And from and after her decease, I give and bequeath unto *Humphery Marks* and *George Marks*, sons of *Solomon Marks*, the sum of 200*l.* each, and to *Kitty Marks*, my grand-daughter, the sum of 100*l.*, and to *Aaron Marks*, 100*l.*, and to each other of my surviving grand-children, sons and daughters, lawfully begotten by my daughter, *Amelia Marks*, when they respectively arrive at the age of twenty-one years, the sum of 50*l.* each. And in case any or either of them depart this life before they arrive at the age of twenty-one years, the share or shares of such deceased shall be divided and paid, together with all overplus monies, be paid to the survivors then living, share and share alike. And I also give and bequeath unto each of my nephews and nieces as shall be living at the time of my decease and arrive at the age of twenty-one

years, the sum of 20*l.* each. And I give and bequeath unto *Sarah Cohen*, *Betty Hart*, *Deborah Harris*, *Deborah Hart*, and *Sinime Hart*, otherwise *Sophia Hart*, daughters of *Barnet Hart*, the sum of 20*l.* each. And to *Henry Hart*, attorney, my cousin, two guineas for a mourning ring. And, as to the remaining part of the said estate, the same to be put out at interest in the Bank of *England*, as aforesaid, for the benefit of my said wife, *Mary Joel*, during her life. And from and after her decease, then the said legacies and payments to be paid to my grandchildren, sons and daughters as aforesaid. And my will is, that all monies be kept in the Bank of *England*, for the benefit of the parties entitled to the same, as aforesaid, after the decease of my said wife. And my will is, that the monies belonging to me in the *Friendly Society* called the Lodge of Friends Society, and *all other Societies*, when received, shall go and belong to my wife, *Mary Joel*, for her own use and benefit."

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 v.  
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 —  
*Statement.*

At the time of his death, the testator had a sum of 500*l.* invested in the Commercial Loan Society, 432*l.* 13*s.* 6*d.* in the Hand in Hand Loan Society, 40*l.* 13*s.* 9*d.* in the Crown Loan Society, but no money in the Lodge of Friends Society.

Upon the cause coming on for further directions before the *Vice-Chancellor of England*, his Honor held, that, according to the true construction of the will, *Mary Joel*, the widow of the testator, was absolutely entitled to those three sums.

The Plaintiffs appealed from that decision.

Mr. *Malins* and Mr. *Hetherington*, in support of the appeal. *Argument.*

The testator made a distinction between Loan Societies and Friendly Societies, and there is a material difference

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 Argument.

between them. Loan Societies are of such a nature as is sanctioned by the 3 & 4 Vict. c. 110; Friendly Societies are under the regulations provided by 4 & 5 Will IV, c. 40. The expression, "all other Societies," means Societies *ejusdem generis* with the Friendly Society which the testator has just named, and cannot be construed so as to alter the disposition made by the former part of the will, which gives the wife a life interest only in the other property of the testator: *Vaughan v. Buck* (a).

Mr. Stuart and Mr. Baggallay, contra.

*Judgment.*

The LORD CHANCELLOR said, that there was no doubt as to the nature of the Societies. The Acts of Parliament by which they were regulated shewed the distinction between them. In Loan Societies, advances were made upon which interest was payable, which interest, as well as the principal, belonged to the party who advanced the principal. In Friendly Societies, periodical payments were made, in respect of which a sum would become payable on some future event. They were, in fact, like Life Insurance Societies. As to the meaning of the testator, there was no reasonable ground for doubt on the face of the will. The testator, at the date of his will, had property in Societies of both those descriptions. He made a certain provision for his wife by giving her a life interest in his money invested in Loan Societies, and also in the residue. He then gave to her, absolutely, his money in a particular Friendly Society and "all other Societies." Looking at the disposition made by the testator's will, the expression must be taken to mean other Societies of the same description, namely, Friendly Societies. All the dispositions of a will must be looked at in order to make all the parts of it as consistent

(a) 1 Ph. 75.

as possible, and if the latter bequest was considered as over-  
turning the other, it made the whole inconsistent; but if  
it was taken as giving to the wife a further benefit arising  
from monies which must be received from Friendly So-  
cieties, the whole will would be consistent, and the wife  
would receive an increased benefit from those monies, as  
the testator appeared to intend that she should do. His  
expression, "when received," shewed that he was still  
speaking of Friendly Societies.

The *Vice-Chancellor's* decision must be reversed, and it  
must be declared that the widow took a life interest only  
in the monies invested in the Loan Societies.

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v.  
SOLOMONS.  
Judgment.

SANDERSON v. THE COCKERMOUTH AND WORK-  
INGTON RAILWAY COMPANY.

Feb. 6th,  
11th & 12th.

**T**HIS was an appeal by the Defendants from a decision  
of the *Master of the Rolls*, which is reported in 11 Beav. 497.

The Company had been incorporated by an Act of 8 & 9  
Vict. c. cxx, and they were desirous of forming their  
railway through lands of the Plaintiff; and by an agree-  
ment entered into in March, 1846, the Plaintiff contracted  
to sell to the Company so much of certain pieces of land  
as he could, by virtue of the Act or otherwise, agree to  
sell, and as should be required by the Company, "subject  
to the making of such roads, ways, and slips for cattle as  
might be necessary, for the sum of 352*l*."

A Railway  
Company about  
to sever the  
Plaintiff's land  
by their rail-  
road, agreed to  
purchase the  
necessary por-  
tion of land,  
"subject to the  
making of such  
roads, ways, and  
slips for cattle  
as might be ne-  
cessary."—  
*Held*, that the  
Plaintiff was  
entitled to a  
specific perform-  
ance, and to  
have such roads,  
ways, and slips

for cattle as might be necessary and proper for convenient communication between the severed por-  
tions of the Plaintiff's land; and a reference was therefore directed, to ascertain what was necessary  
and proper.

Where land is taken by a Railway Company, not under their compulsory powers but by private  
contract, the jurisdiction of the Court of Chancery to secure to the vendor the easements he con-  
tracted for, is not ousted by the provisions of the Railway Acts.



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THE COCKER-  
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COMPANY.

*Statement.*

The lands had been conveyed to the Company, and the railway had been made through them, principally by means of a deep cutting, but in one part on a level. The Company proposed to give to the Plaintiff the means of communication between the severed parts of his land, by a level crossing for loaded carriages, and by a covered drift-way or creep underneath the line. The Plaintiff contended that this was not sufficient; and he filed this bill, praying that the agreement, so far as it remained to be executed, might be specifically performed under the direction of the Court; and that the Company might be directed to make all such roads, ways, and slips for cattle as were necessary and proper, for and with regard to the convenient and advantageous occupation of the Plaintiff's said lands; and that the Company might, in the mean time, be restrained from using the land taken by them from the Plaintiff, so as to prevent or obstruct the free passage and communication between the severed parts of the Plaintiff's land, and in particular from running any steam carriage over that part of their railway.

A motion was afterwards made for an injunction; but on the Company submitting to perform the agreement, and to abide the directions of the Court, no order was made.

Upon the cause coming on for hearing, the *Master of the Rolls* made a decree for specific performance, and referred it to the Master to inquire what roads, ways, and slips for cattle were necessary and proper, or required, for the purpose of obtaining and preserving convenient communications between the portions of the Plaintiff's land which were severed by the railway.

*Argument.*

Mr. *Roupell* and Mr. *Renshaw* for the Plaintiff, in support of the decree, contended, that the acts which the

Plaintiff required to have done by the Company, were of such a description that this Court could interfere to enforce the performance of them: *Pembroke v. Thorpe* (a), *Price v. The Corporation of Penzance* (b), *Storer v. The Great Western Railway Company* (c); and that the jurisdiction of this Court was not ousted by the Lands Clauses or by the Railways Clauses Consolidation Acts: *Sheriff v. Coates* (d), *Coats v. The Clarence Railway Company* (e), *Kemp v. The Brighton Railway Company* (f).

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COMPANY.  
Argument.

Mr. *Malins* and Mr. *Borton*, for the Appellants, insisted that they had already provided sufficient means of communication for the Plaintiff, and had therefore performed their part of the agreement. But if not, the Plaintiff had mistaken his remedy. The 352*l.* was the price for the land and the compensation for the severance, and in addition to that, the Plaintiff was entitled to proper means of communication between severed parts; and if there was any difference of opinion on that point, the Railways Clauses Consolidation Act, sects. 68, 69, referred the matter to the decision of two Justices.

[The LORD CHANCELLOR.—The Act leaves it to Justices where it is not a matter of contract. This Court would not have jurisdiction if that part had not been inserted in the contract; but as it stands, the Court will prevent an infringement of that part of the agreement, and will interfere to perform it.]

The law gave the Plaintiff a right to proper means of communication. In *De Visme v. De Visme* (g), the principle was stated: "It does not appear very obvious why a contract, which is specified in terms, and a contract which

(a) 3 Swanst. 437, n.  
(b) 4 Hare, 506.  
(c) 2 Y. & C. C. C. 48.  
(d) 1 Russ. & My. 159.

(e) 1 Russ. & My. 181.  
(f) 1 Railw. Cas. 495.  
(g) 1 Hall & T. 419.

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the law implies, though not specified, should make any substantial difference between the parties." *Skerratt v. The North Staffordshire Railway Company*(a), which related to the building of a bridge, was the only case which was at all in favour of the Plaintiff's claim. They also cited *Dudley v. Horton*(b).

*Judgment.*

The LORD CHANCELLOR:—

This is an agreement by a Railway Company to purchase certain lands. The agreement takes notice of the Act, but only for the purpose of shewing the authority of the parties purchasing to deal with the subject-matter of the contract. It is, in fact, a private contract, and the only difference between this and other contracts is, that the parties purchasing are authorised to contract by an Act of Parliament. The contract provides, that the purchase shall be made subject to the making of such roads, &c., as may be necessary. The Company, by virtue of this contract, get possession of the vendor's land. Then comes the dispute as to the communications. Whether that dispute is well founded or not, the Court will best be able to judge by means of the Master's report. The Plaintiff has a right to have the jurisdiction of the Court exercised upon this contract, as to whether what has been tendered to him by the Company was such a communication as he was justified in expecting. The property has been taken by the Company, and the Plaintiff now asks that the contract may be performed on the part of the Company. The order made upon the motion for an injunction, left it open for the Defendants to contest the question of jurisdiction.

But, independently of the submission of the parties to perform the contract, I think the Court had jurisdiction to decree specific performance in this case. No doubt the Acts of Parliament did not intend to interfere with private

(a) 5 Railw. Cas. 166.

(b) 4 L. J., Chanc., O. S., 104.

contracts. The Company, having a capacity to purchase by virtue of their Act, may deal with parties within the limits of the Act, by such contracts as they may think proper. They have a right to obtain the land they require by private contract; but if they cannot make a private contract, then the Act gives them the means of compelling proprietors to part with their land. But the provisions of the Act apply only to cases in which there is a compulsory taking by the Company, and do not interfere at all with private contracts. Here the parties have not been acting at all under the Act, except so far as the individuals agreeing to purchase derive their capacity to purchase under the Act. Beyond that, it is a mere private contract for sale to the Company. What is the contract? It is a contract for the purchase of lands, subject to the duty of making communications between the lands severed by the railway. The Defendants having got from the Plaintiff a performance of his part of the contract, must not the Court interfere for the purpose of securing to the Plaintiff that advantage which he has contracted for? The Railway Acts regulate the method of compulsory purchases, but there are no such distinct provisions in the Acts for regulating the mode in which private contracts entered into by a Company shall be carried out. There is no doubt that this Court has jurisdiction in such last-mentioned contracts, for there is nothing to take away the Court's original jurisdiction to see that the enjoyment of the easements contracted for is secured to the vendor. None of the cases referred to apply to the case of a private contract, which this is.

The Court, then, has adopted the right course in decreeing specific performance, and the right means of carrying that decree into effect. The Court does not enter into the details of whether such and such a transit be sufficient or not: all that is for the Master to consider. The appeal must be dismissed, with costs.

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 RAILWAY  
 COMPANY.  
*Judgment.*

1850.

Feb. 7th &  
8th, &  
June —.

The Court of Chancery will, in proper cases, grant an injunction to restrain parties from applying to Parliament for a private Act, or an Act respecting property; but it will not do so merely upon the ground that such Act would interfere with existing rights, whether they exist by the tenure of property or by virtue of contract.

A landowner withdrew his opposition to a bill before Parliament, on the faith of an agreement with the Railway Company, that they should in the next session of Parliament apply for an Act authorising the formation of a branch railway to certain works belonging to such landowner. The Company obtained an Act in the following session, but afterward gave notice of their intention to apply for another Act, authorising them to abandon that branch:—*Held*, that there was no ground for granting an injunction to restrain the Company from applying for such an Act.

## HEATHCOTE v. THE NORTH STAFFORDSHIRE RAILWAY COMPANY.

THIS was an application to the *Lord Chancellor*, to discharge an injunction which had been granted by the *Vice-Chancellor of England*, to restrain the Company, and their secretary, servants, and agents, from presenting any petition, and from making or prosecuting any application to Parliament for obtaining an Act to authorise the Defendants to abandon or relinquish the *Silverdale* and *Apedale* branch railways, or either of them, or to authorise anything whatever to be done, or omitted to be done, by the Defendants, inconsistent with or repugnant to the covenant on the part of the Defendants contained in an indenture of the 10th of October, 1846, and from giving any notice, or taking any proceedings required by the Standing Orders of either House of Parliament, to warrant the introduction into or the progress through Parliament of any such Act, until the hearing of these causes, or until the further order of the Court; and it was also asked, that the motion on which the *Vice-Chancellor's* order had been made might be refused, with costs.

The motion before the *Vice-Chancellor* was made in an original and supplemental suit. The original bill was filed in July, 1849. It stated the passing of the North Staffordshire Railway (Pottery line) Act, 1846, by which the Company were authorised to make their main line, and also a branch line called the *Silverdale* Branch. The Plaintiff was the owner of some land through which the proposed railway was to pass, and also of some furnaces called the *Apedale* Furnaces, and of a canal from them to *Newcastle-under-Lyne*, called the *Gresley Canal*. The

Plaintiff opposed the Company's bill before Parliament; but an agreement was come to between the promoters of the bill and the Plaintiff, on the faith of which he withdrew his opposition, and the bill received the Royal assent in June, 1846. An indenture was afterwards executed between the Company of the first part, and the Plaintiff of the second part, and dated the 10th of October, 1846, by which he agreed to assist the Company in obtaining an Act, authorising the formation of a branch railway to *Apedale*, and also to convey to the Company so much of the bed and soil of the *Gresley Canal* as lay between two points specified on a plan annexed to the indenture; and the Company agreed that they would, in the next session of Parliament, apply for and use their utmost endeavours to obtain an Act, empowering and requiring the Company to make a branch line of railway, commencing by a junction with the *Silverdale* branch from the *North Staffordshire* Railway (Pottery line), at or near *Newcastle-under-Lyne*, to *Apedale*, and that they would complete and open it for use, and for ever maintain it.

In the next session of Parliament (1847) the Company applied for and obtained an Act, authorising them to make the *Apedale* Branch.

The bill stated, that the Company had not taken any steps toward making the *Apedale* Branch, and that they had determined not to make that branch at all, and to make a portion only of the *Silverdale* Branch; and that not only the construction of the *Apedale* Branch, but also the extension of the *Silverdale* Branch, to the furthest point authorised by the Company's Acts, or at least to a point considerably beyond that to which the Company had determined to carry the same, was most important to the interests of the Plaintiff.

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—  
*Statement.*

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 ———  
*Statement.*

The bill—after praying a declaration that no part of the Plaintiff's hereditaments comprised in the agreement of the 10th of October, 1846, was subject to be taken by the Company under the compulsory powers of purchasing contained in their Acts—prayed that the Company might be decreed specifically to perform the agreement on their part, and with all practicable expedition to complete and open for use the *Apedale* branch railway, and also the *Silverdale* branch railway, to the full extent authorised by the Acts, the Plaintiff being ready to perform the agreement on his part.

The supplemental bill was filed in December, 1849, stating, that since the filing of the original bill the Company had determined upon applying to Parliament in the ensuing session for an Act to authorise them to abandon the formation of the *Silverdale* and *Apedale* branches, and had served notice of that intention upon divers landowners whose land was authorised to be taken for the purposes of those branches.

The bill prayed for an injunction in the terms in which the injunction had been granted by the *Vice-Chancellor*.

*Argument.*

Mr. *Bethell*, Mr. *Malins*, and Mr. *Bovill*, for the Company, in support of the motion, contended that the Plaintiff was unable to perform his part of the agreement, inasmuch as he was not competent to convey the *Gresley Canal* to the Company. The time within which the Company were authorised to make the *Silverdale* branch had expired, and therefore it was useless to make the *Apedale* branch, which was to run into the other. But the Act prohibited the Company from making any dividends until that branch was opened; and it therefore became necessary to obtain Parliamentary sanction for its abandonment. The relief

which the Plaintiff sought by this bill was such as the Court could never grant. How could a Master be appointed to superintend the making of a railway? Still less could such an officer of this Court see that it was always maintained. And as the Court could not in any case carry out such an agreement as that of the 10th of October, 1846, it would not grant the injunction, which was only ancillary to the relief. In *The Duke of Beaufort v. Neeld* (a), the propriety of granting an injunction to restrain a Commissioner from making his award, was held to depend upon the fact, whether the Plaintiff could have any relief at the hearing. If the Plaintiff had any cause for complaint, he should apply for a *mandamus*: *The Queen v. The Eastern Counties Railway Company* (b). The agreement on the part of the Company was to apply for an Act: they had done so; and the Act being obtained, the agreement was at an end, and the rights of the parties were thenceforward determined by the Act; but any claims of the Plaintiff against the Company would not be destroyed by authorising the Company to abandon the branch railway. This Court would, in proper cases, restrain a party from opposing a bill in Parliament; but there was no authority for its interference to restrain a Company, which had obtained an Act for public purposes, from going to Parliament again to alter the former enactments, and to solicit a public Act on public grounds. The only ground upon which any one was allowed to oppose a bill was, that it interfered with some private right in which he was interested; but he might contract himself out of that right: *The Stockton and Hartlepool Railway Company v. The Leeds and Thirsk and The Clarence Railway Companies* (c).

Mr. R. Palmer and Mr. Amphlett, contra, insisted that this Court would endeavour to ascertain the intentions

(a) 12 C. & F. 248.

(b) 10 A. & E. 531.

(c) 2 Ph. 666.

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of the parties, and the agreements they had actually entered into, and would if possible enforce them, even in cases where they might not be binding in law: *Tulk v. Mozhay* (a); and in *Dietrichsen v. Cabburn* (b), it was held, that the Court would restrain a Defendant, although it had not jurisdiction over the acts of the Plaintiff. In the present case, the consideration for the withdrawal of the Plaintiff's opposition was the agreement to make two branch railways. The jurisdiction of the Court to restrain applications to Parliament had been frequently acted on. A party was not allowed to oppose a bill except on the ground that his private rights would be injured; but when he was once allowed to oppose it, his opposition was not confined to his private rights. He might oppose the preamble and everything in the Act.

[*Brocklebank v. The Whitehaven Junction Railway Company* (c), *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway Company* (d), *Price v. The Corporation of Penzance* (e), *Ware v. The Grand Junction Waterworks Company* (f), *Cunliff v. The Manchester and Bolton Canal Company* (g), and *The London and North Western Railway Company v. Smith* (h), were also cited.]

Mr. Bethell replied.

The LORD CHANCELLOR forwarded the following judgment before he resigned his office:—

June —.

Judgment.

The injunction which was granted by the *Vice-Chancellor of England*, and which this motion seeks to dissolve,

(a) 1 Hall & T. 105.

(b) 2 Ph. 52, 56.

(c) 15 Sim. 632.

(d) 2 Ph. 597.

(e) 4 Hare, 506.

(f) 2 Russ. & My. 470.

(g) Id. 480, n.

(h) 1 Hall & T. 364.

in substance restrains the Defendants from making any application to Parliament for obtaining any Act authorising them to abandon or relinquish the *Silverdale* and *Apedale* branch railways, or either of them, or to authorise anything whatever to be done, or omitted to be done, inconsistent with or repugnant to the covenant contained in an indenture of the 10th of October, 1846. By this covenant the Defendants agreed with the Plaintiff, that they would, in the then next session of Parliament, apply for and use their utmost endeavours to obtain a distinct and separate Act, empowering and requiring them to make and construct a branch line of railway, commencing by a junction with the Company's *Silverdale* branch from the *North Staffordshire Railway Pottery* line, at or near to *Newcastle-under-Lyme*, and terminating at or near to the furnaces of *Apedale*; and that they would, with all practicable expedition after such authority should have been obtained, complete and open for use the said *Apedale* branch railway at their own expense in all things, and would for ever thereafter maintain the same at the like expense. It will be observed, that the proposed Act was to authorise the *Apedale* branch; the authority for the *Silverdale* branch had been obtained by an Act of the session of 1846; but the *Apedale* branch was to run into, and so in part form one with the *Silverdale*. In 1847, an Act for making the *Apedale* branch was accordingly applied for and obtained, authorising, but not otherwise requiring, the Company to make such branch, but no part of it has ever been made; and the supplemental bill states a notice dated the 30th of November, 1849, on the part of the Defendants, sufficient, for the purpose of an injunction, to shew an intention of applying to Parliament for an Act to authorise them to relinquish the formation of the *Silverdale* and *Apedale* branches; and the questions are,—first, whether this Court has jurisdiction to interfere by injunction to prevent such application to Parliament;

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secondly, if it has, whether a proper case is made for the purpose.

Upon the first point, it has been suggested that this Court could not interfere without infringing upon the privileges of Parliament. So the courts of common law thought at one time, and there is as much foundation for the one as for the other supposition. In both cases this Court acts upon the person and not upon the jurisdiction. In a proper case, therefore, I have said here and elsewhere, that I should not hesitate to exercise the jurisdiction of this Court by injunction touching proceedings in Parliament for a private bill, or a bill respecting property; but what would be a proper case for that purpose, it may be very difficult to conceive. The case of Parliament differs widely from that of the courts of common law. The province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal rights; but the ordinary province of Parliament in such bills is to abrogate existing rights and to create new ones. To hold, therefore, that no application should be made to Parliament, because the object of the application was to interfere with some right or interest of some other party, would be in effect to hold that this Court should, by its injunction, deprive the subject of the benefit of Parliamentary interference in all such cases. In many settlements there is a want of some power essential to the proper management of the property: Parliament is in the habit of exercising its discretion in supplying the defect; but if any party interested could obtain an injunction against such proceeding upon the ground that what was proposed would interfere with his estate and interest, Parliament would have no opportunity of exercising its discretion. So in Railway Acts, every owner on the line of the intended railway has an interest in the exercise of the powers asked: the pro-

moters of the bill ask for powers to interfere with their interests, and to take land which the owners may be most anxious to retain; but it has never been suggested that the Court could interfere by injunction to prevent the promoters from prosecuting such bill. The injunction, therefore, cannot be granted upon the ground that the Act applied for would interfere with existing rights, it being the very object of it to do so. What difference, then, can it make whether such pre-existing right exist by the tenure of property or by virtue of contract? In both cases Parliament has the same power of destroying, altering, or affecting such pre-existing rights, providing, as it always does, or intends to do, compensation to the party affected; and in neither case has this Court a right to interfere by injunction to deprive the subject of the right of applying to Parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contracts or otherwise.

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It is also to be observed, that the contract which the Plaintiff seeks to preserve is one which this Court cannot specifically perform: it cannot decree the Company to make the two branches in question; but they, having obtained power to make them, and having covenanted to make and maintain the *Apedale* branch, in which the Plaintiff has an interest, and neglecting or refusing to perform such covenant, may be liable at law for such neglect or refusal; and to enforce such liability is the whole of the right which the Plaintiff can have under this covenant. But does that, which the Plaintiff alleges the Defendants are seeking to obtain from Parliament, interfere with such right? The object of the application to Parliament is to authorise the Company to relinquish the formation of those two branches, and not to relieve them from liability to any contracts into which they may have entered, in contemplation of making them. Suppose they

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*Judgment.*

had agreed for the purchase of land in the line of the *Apedale* branch; although they relinquish the formation of the line, they may still be liable to complete the purchase: and could the owner obtain an injunction to prevent the Defendants obtaining an Act to authorise such relinquishment? It is well known, that after those Companies have involved themselves in all the difficulties and liabilities incident to such undertakings, the aid of Parliament, or of some authority derived from Parliament, is necessary to extricate them; but this does not necessarily extend to protecting them against liability to contracts they may have entered into. It is not alleged in the supplemental bill that such is intended to be the object of the Act applied for; and if it were, it would only shew that the Plaintiff has an interest in the subject-matter of the petition to Parliament, which would probably entitle him to be heard upon it. The covenant is a merely legal contract, which the Act asked for may prevent the Defendants from performing; but that is all. If *A.* contract with *B.* to deliver goods at a certain time and place, will equity interfere to prevent *A.* from doing anything which may or can prevent him from so delivering the goods? If, indeed, *A.* had agreed to sell an estate to *B.*, and then proposed to deal with the estate so as to prevent him from performing his contract, equity would interfere; because in that case *B.* would, by the contract, have obtained an interest in the estate itself, which, in the case of the goods, he would not.

Independently, therefore, of the objection, that the injunction restrains an application to Parliament for a purpose which the Plaintiff has no right to control, there is, I think, a want of equity arising from the nature of the contract itself; and I am therefore of opinion that the injunction ought to be dissolved, and the motion before the *Vice-Chancellor* refused, with costs.

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PADBURY v. CLARK.

Feb. 9th &  
11th.

**T**HIS was an appeal from a decision of the *Vice-Chancellor of England*.

Under the will of *James Salkhill*, who died in 1796, the legal estate in two houses at *Tottenham High Cross* was vested in *John Cox*, and he was beneficially entitled in fee simple to one moiety of them, the other moiety being the property of his sister *Mary Cox*. One of those houses was occupied by *Thomas Upton*, and the other by Mr. *North*.

*Mary Cox* attained twenty-one, and in 1809 she intermarried with the Defendant *Henry Brown*, and died shortly afterwards, leaving one daughter, *Mary Cox Brown*, her only child and heiress-at-law, whereupon *Henry Brown* became tenant by the curtesy to an undivided moiety of the two houses.

The case made by the bill was, that *John Cox* and *Mary Brown* entered into possession of the two houses, and that *John Cox*, as heir-at-law of *James Salkhill*, erroneously considered himself entitled to make choice of the two houses, and to take the entirety of either of them as his own; and that he accordingly determined to take the house which he subsequently devised by his will, and which he described as being in the occupation of *Thomas Upton*. That the rent had for some time been received by *William Crook*, as the agent of both, and had been handed over to *John Cox* and *Henry Brown*, in equal moieties; that *Henry*

A testator devised to the Plaintiff all his freehold house at *T.*, then on lease to *T. U.*, queathed all and he be- his undivided moiety in a leasehold house at *P.* to his niece and heir-ess-at-law. The testator had no house at *T.*, but he and his niece were entitled, in undivided moieties, to two houses at *T.*:—*Held*, that the language of the will shewed an intention to devise the entirety of the house, and that, consequently, a case of election arose against the niece.

The rents of the leasehold house had been received by the father of the niece, who was an infant, until some years after the lease expired, and on her attaining twenty-one he accounted to her for the rents. She shortly after-

ward made a mortgage of the entirety of the leasehold house, and of her moiety of the freeholds at *T.*, and upon her marriage executed a settlement which comprised the same property. A lease was afterward executed of the freeholds, in which the Plaintiff concurred with the testator's niece and the trustees of her settlement:—*Held*, that, under the circumstances, no election had already been made by the niece; and she, electing at the hearing to take against the will, was decreed to account for the rents received on her account in respect of the leaseholds.

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*Brown* had subsequently received them, and accounted to *John Cox* for one moiety and retained the other moiety for his own use. That *John Cox*, at the time of his death, was also possessed of a moiety of a house in *Park-street*, *Grosvenor Square*, for the remainder of a long term of years, which did not expire until some years after his death.

*John Cox* made his will in March, 1812, and thereby devised to his aunt, *Catherine Padbury* (the Plaintiff's mother) all that his freehold messuage or tenement, with the garden and all and singular the appurtenances thereto belonging, situate at *Tottenham High Cross*, then on lease to *Thomas Upton* and in his occupation; to hold the same unto his aunt, *Catherine Padbury*, and her assigns, for her separate use, during her life, and after her decease he gave and devised the said messuage, &c. to the Plaintiff, *Samuel Padbury*, his heirs and assigns for ever. And the testator also gave unto *William Crook* all that his moiety of and in the leasehold messuage, &c. in *Park-street*, and then in the occupation of *Mr. Mangles*, upon the trusts, until the determination of his estate and interest therein, to receive his proportion of the rents and profits thereof, and invest the same as it should become due and payable in the purchase of 5l. per Cent. Bank Annuities, in the name of his niece *Mary Cox Brown*, daughter of his late sister the wife of *Henry Brown*; and he directed that the produce thereof, together with the interest thereon, should remain invested and be received by his said niece, *Mary Cox Brown*, on her attaining the age of twenty-one years or day of marriage.

*John Cox* died in 1812, leaving *Mary Cox Clark*, then *Mary Cox Brown*, his heiress-at-law surviving.

The Plaintiff insisted that *Mary Cox Clark*, on the death of *John Cox*, or at any rate on attaining twenty-

one, was bound to elect whether she would take under the will of *John Cox*, without interposing her claim as heiress of *Mary Brown*, in frustration of the devise, or whether she would take as heiress, and give up the leasehold house in *Park-street*, bequeathed to her by the same will; that *Henry Brown*, during the minority of *Mary Cox Clark*, as her father and guardian elected to take under the will, and that the Plaintiff lately discovered that this was confirmed by her on her attaining twenty-one, and that her father accounted with her for the rents and profits of the moiety of the leasehold house in *Park-street*, which exceeded in value the moiety of the freehold house formerly in the occupation of *Thomas Upton*; that *Henry Brown* from the death of his wife received one moiety of the rents of the freehold house, as tenant by the curtesy, and from the death of *John Cox*, *Catherine Padbury*, and after her death the Plaintiff, received the rents of the other moiety of the house formerly in the occupation of *Thomas Upton*.

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*Catherine Padbury* died in 1830.

*Mary Cox Clark* attained the age of twenty-one on the 16th of December, 1831, and the bill charged that she was a trustee for the Plaintiff and his heirs of the entirety of the house formerly in the occupation of *Thomas Upton*, subject to the interest of *Henry Brown* in a moiety thereof, as tenant by the curtesy, and that she ought to have conveyed one moiety to the Plaintiff and his heirs, and the other moiety to *Henry Brown* for life, as tenant by the curtesy, and after his death to the use of the Plaintiff, his heirs and assigns.

In November, 1832, *Mary Cox Clark* executed a mortgage, by which she conveyed and assigned the legal estate in fee simple, not only in the house occupied by Mr. North,



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but in her one moiety of the house occupied by *Thomas Upton*, to *Sophia Layden* and *W. B. Ramsden*, to secure the repayment of the sum of 160*l.*, with interest. By an assignment executed in July, 1837, and indorsed upon the mortgage, *Robert Pearce* and *William Crosby M'Nae* took a transfer of the mortgage from *Sophia Layden* and *W. B. Ramsden*.

In 1833, *William Clark* and *Mary Cox Brown* intermarried; and by their marriage settlement, executed in June, 1833, they joined in conveying the house occupied by *North* and the moiety of the house occupied by *Upton* to *James Brown*, since deceased, and *Percival Turner*, for the benefit of themselves for life, with remainder for the benefit of the children of the marriage, of whom there were seven, who, together with the surviving trustee of the settlement, were made Defendants to the bill.

The bill then charged that the mortgagees, and also the trustees of the settlement, had full notice of all the documents and of all the facts stated in the bill.

On the 28th of August, 1833, the Plaintiff and the trustees of the settlement made upon the marriage of *William Clark* and his wife, together with *Henry Brown*, joined in granting a lease of the entirety of the house formerly in the occupation of *Thomas Upton* to *Mr. Gasson*, for thirty years from Lady-day, 1833, at a rent of 20*l.*, which was made payable to the lessees in general terms.

The bill then prayed, that the trusts of the will of *James Salkhill* remaining unperformed might be carried into effect, and that *Robert Pearce*, *William Clark*, and *Mary Cox* his wife, might convey the freehold house and garden formerly in the occupation of *Thomas Upton* to

the use of the persons who now had become entitled thereto; and that it might be declared that *Mary Cox Clark* upon attaining twenty-one, besides conveying to the Plaintiff in fee simple one moiety of the last-mentioned freehold house and garden, became and was bound to elect whether, as the heiress-at-law of *Mary Brown*, she would take against the will of *John Cox*, and hold the other moiety of the said last-mentioned freehold house and garden, and assign and hand over to the Plaintiff the said moiety of the said leasehold house in *Park-street*, and the rents and profits derived therefrom since the death of the said *John Cox*, or a competent part thereof, or whether she would take under the will of *John Cox*, and retain the moiety of the leasehold house and the rents and profits derived therefrom, and convey the last-mentioned moiety of the freehold house and garden formerly in the occupation of *Thomas Upton* to the use of the Plaintiff and his heirs, subject to the life interest of the said *Henry Brown* as such tenant by the curtesy; and that it might be declared that the Defendant *Mary Cox Clark* had elected to take, and had taken, under the will of *John Cox*; and that, accordingly, besides conveying to the Plaintiff in fee simple one moiety of the said last-mentioned freehold house and garden, the said *Robert Pearce*, *William Clark*, and *Mary Cox* his wife, and all proper and necessary parties, might be decreed to convey the other moiety of the same freehold house and garden to the use of *Henry Brown* for his life, as tenant by the curtesy, with remainder to the Plaintiff in fee. And in case the Court should be of opinion that the Defendant *Mary Cox Clark* had not irrevocably elected to take under the will of *John Cox*, that it might be declared that the said last-named Defendant and those claiming under her were bound to elect.

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From the evidence in the cause, it appeared that the lease of the house in *Park-street* expired in 1819, and that

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*Statement.*

it was subject to a very heavy ground rent; and that the rent arising from the house was applied during her infancy partly in her maintenance; and that a surplus of about 40*l.* was laid out in the purchase of Long Annuities; that, upon *Mary Cox Clark* attaining twenty-one, an account was rendered to her by *Henry Brown* of the rents, and she received the money arising from the sale of the Long Annuities.

Upon the cause coming on before the *Vice-Chancellor of England*, he declared, that, upon attaining the age of twenty-one years, *Mary Cox Clark* was bound to elect; and that *Mary Cox Clark*, after attaining twenty-one, and before the making of the mortgage to *Layden* and *Ramsden*, had duly elected to take under the will of *John Cox*; and that she became and was bound not only to convey to the Plaintiff in fee simple the undivided moiety of the freehold house, &c., to which *John Cox* was beneficially entitled, but also became and was bound to convey to the Plaintiff in fee simple the other undivided moiety of the said house, &c., but as to such last-mentioned moiety, subject to the life interest of *Henry Brown*, as tenant by the curtesy; and it was ordered, that the Defendants *William Clark* and *Mary Cox* his wife, *Robert Pearce*, and *William Crosby M'Nae*, and *Percival Turner*, should convey and join in conveying the entirety of the house to the Plaintiff, freed from the mortgage debt and all incumbrances, except the tenancy by the curtesy. It was also ordered, that the same five Defendants should deliver up to the Plaintiff upon oath all deeds and documents in their respective possession relating to the title of the said freehold house, or such of them as did not relate to premises of greater value. It was also ordered, that the Plaintiff should pay the costs of *Henry Brown*, against whom the replication had been withdrawn, and who had been examined as a witness;

and it was ordered, that the Defendants, *William Clark*, *Robert Pearce*, and *William Crosby M'Nae*, and *Percival Turner*, should pay to the Plaintiff his costs of the suit.

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Statement.

Against this decree all the Defendants except *Henry Brown* appealed.

Mr. *Malins* and Mr. *Shebbeare*, in support of the appeal. Argument.

The questions in this case are: First, Whether this is a case for election; Secondly, Whether any election has been made; Thirdly, Whether, after such a lapse of time, this suit ought to be maintained.

First, To raise a case of election, it should be clear that the testator intended to dispose of what did not belong to him. Now, in this case, *John Cox* by his will gave to *Catherine Padbury* "all that my freehold messuage on lease to *Thomas Upton*;" this would clearly pass the moiety to which he was beneficially entitled; and, if the words are satisfied by that construction, the Court will not extend the words so as to include that which did not belong to the testator, where the effect of that would be to disinherit the heir. The Plaintiff also joined in the lease in 1833, and thereby admitted that the parties who claimed through *Mary Cox Brown* were interested in that portion of the property. That transaction is quite as strong against an election, as the acceptance by *Mary Cox Brown*, from her father, of a sum on account of the rent of the leaseholds. It was said there was an intention to dispose of the entirety; but if a party having a power disposes of property, and the language of the instrument can be satisfied by reference to any property or any interest whatever not the subject of the power, it shall be held to apply to that

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property or that interest, and not to the subject of the power: *Denn d. Nowell v. Roake*(a). And in this case sufficient has passed to answer the words "all my freehold messuage," without including the undivided moiety belonging to Mrs. Clark. But the Plaintiff, ever since the death of the testator, has acquiesced in the division of the property, and against this no notice could affect the purchaser for value: *Shuttleworth v. Greaves*(b). The Defendants are entitled, at all events, to so much of the costs of this suit as asked for the conveyance of the one moiety, as no application had ever been made to Mrs. Clark to convey it.

Secondly: Assuming there was a case for election, the party had a right of choice, and it must be a deliberate act: *Dillon v. Parker*(c), *Edwards v. Morgan*(d); and the party has a right to know the precise and relative value of the property before he can be put to his election. It was said that there had been an election; but, in *Reynard v. Spence*(e), the holding property for five years had been held not to amount to an election; that part of the decree, therefore, which declares that *Mary Cox Clark* has elected, is without precedent.

Thirdly, The Plaintiff has allowed so many years to elapse without urging his claim, and has so far acquiesced, that the Court will not now interfere: *Dummer v. Pitcher*(f), *Butricke v. Broadhurst*(g), *Wake v. Wake*(h).

Mr. T. Parker, junior, appeared for Messrs *Pearce* and *M'Nae*; and

Mr. Keene for *Percival Turner*.

(a) 5 B. & C. 721.

(b) 4 My. & Cr. 35.

(c) 1 Swanst. 359.

(d) M'Cl. 541.

(e) 4 Beav. 103.

(f) 2 My. & K. 274.

(g) 1 Ves. jun. 171.

(h) Id. 335.

Mr. *Bethell* and Mr. *Kinglake*, in support of the decree.

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First, The word "my" is sufficiently indicative of the testator's intention to pass the entirety of the property. Secondly, The party who was bound to elect had consumed the property, and could not now put the other party in the same condition. She had thereby determined her election, and could not now claim the right of a new choice: *Rumbold v. Rumbold*(a). Thirdly, The Plaintiff's claim to put Mrs. *Clark* to her election would not arise until the death of *Henry Brown*, who was tenant for life of the moiety: *Duke of Leeds v. Earl Amherst*(b). The parties had notice of the Plaintiff's equitable title, for it was inherent in the deeds under which they took. In the lease of 1833, the rent was reserved generally in accordance with the rights of the parties in the property.

Mr. *Glasse* appeared for the Defendant *Henry Brown*.

Mr. *Malins* replied.

The LORD CHANCELLOR afterward delivered the following judgment:—

Judgment.

Two questions are raised by this appeal; first, whether the case be one of election; and secondly, whether a binding election has taken place.—(His Lordship stated the circumstances of the case). The first question depends upon the devise in the will of *John Cox* of the house and premises at *Tottenham*. He was entitled to one moiety only, and his niece, *Mary Cox Brown*, to the other moiety. The gift is in favour of the Plaintiff; and the question is, was it intended to apply to this moiety only, or did the testator intend

(a) 3 Ves. 66.

(b) 13 Sim. 469.

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to give the whole of the house and premises to the Plaintiff? If he intended by the words used to include and give the whole, it is immaterial from what cause that intention proceeded,—whether he forgot or misunderstood his rights, and assumed that he was entitled to take the whole of that house to himself, leaving the other, of which he was also entitled to one moiety, to his niece, who was entitled to the other moiety of it. Looking, then, to the words used for the purpose of ascertaining what the testator intended to give, I do not find any ground for a doubt as to his intention to give the entirety. The words are ample, complete, and correct for the purpose, but wholly inapplicable to the supposed gift of a moiety only; and if this were matter of any doubt, the terms used in the gift of the moiety of the house in *Park-street*, in which he did intend to give a moiety only, would strongly corroborate this construction, shewing the manner in which he describes a moiety of premises, when his intention was only to give a moiety. Upon the first question, therefore, I think the declaration and decree of the *Vice-Chancellor* clearly right, and that the will did raise a case of election against *Mary Cox Brown*, the owner of one moiety of this property, so that she could not withhold her moiety from the Plaintiff, who the testator intended should have it under his will, without giving up to him all benefit which she took under the will, being in fact only the testator's moiety of the house in *Park-street*.

The decree, after declaring that the Defendant *Mary Cox Clark*, formerly *Brown*, was, upon attaining the age of twenty-one, bound to elect, declared, that after attaining that age, and before the making of the mortgage to *Layden* and *Ramsden*, she had duly elected to take under the will, and thereby became bound to convey the moiety of the testator, in the premises at *Tottenham*, to the Plaintiff, subject to the estate of her father as

tenant by the curtesy. In order to try the accuracy of this declaration, the facts and circumstances which followed the death of the testator must be very carefully investigated.

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The testator died, according to the statement of the bill, in 1812. At the time, his niece, *Mary Cox Brown*, afterwards *Clark*, was under twenty-one, which age she attained in December, 1831, and in 1833 she married the Defendant *Clark*. The act relied upon by the bill, and that, I presume, upon which the decree declares that the testator's niece, *Mary Cox Brown*, afterwards *Clark*, had elected, is, that upon her attaining twenty-one, and before her marriage, her father, who had received the rents for her of the leasehold house in *Park-street* during her minority, paid her a sum of about 40*l.* as the balance of his receipts, being the proceeds of the moiety of the rents of the leasehold house up to the year 1819, when the lease expired; the whole of the other portion of the rent so received by him on account of his daughter having, as he states (he being examined as a witness), been expended by him in her maintenance during her minority. The result therefore is, that the Appellant *Mary Cox Clark*, formerly *Brown*, never was in possession or in the receipt of the rents or profits of the moiety of the house in *Park-street* at any time, the lease having expired long before she attained twenty-one; but that her father, having received such rents during her minority, when she attained twenty-one paid over to her, and she accepted, a small sum as the balance of such rents, the lease itself having long before expired. There cannot be a stronger case in favour of the alleged election than would have been the case, if the lease had been still subsisting when she attained twenty-one; and she had herself received 40*l.* on account of the moiety of such rents; but then it becomes necessary to inquire into the history of the property



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as against which this election is supposed to have been made; for if a party, being bound to elect between two properties but not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt, affording no proof of preference, cannot be an election to take the one and reject the other. And so if the other property be under circumstances that it does not yield rent to be received by the party liable to elect, but such party, particularly if with the knowledge and concurrence of the party entitled to call for such election, deal with such other property as her own, it would seem that such acts ought to be equally insufficient to prove an actual election; for, in both cases, there is, as far as circumstances will admit, an equal dealing with the two properties, and therefore an absence of proof of any intention to elect the one and reject the other. *Henry Brown* being tenant by the curtesy of the half of the house at *Tottenham*, no rent from it could be received by *Mary Cox Brown*, afterwards *Clark*; but it is an admitted fact, and is indeed part of the statement in the bill, that the Appellant *Mary Cox Brown*, afterwards *Clark*, after she attained twenty-one, and before her marriage, mortgaged the moiety of the freehold house, which mortgage is now vested in the Defendants and Appellants, the transferees of the mortgage; that, upon her marriage in 1833, she settled her moiety upon certain trusts for the benefit of herself, her intended husband, and the issue of the marriage, and that, in August, 1833, the Plaintiff, being in his own right, entitled to one moiety, joined with *Henry Brown*, entitled as tenant by the curtesy to a life estate in the other moiety, and the trustees of the settlement of the Appellants, *William Clark* and *Mary Cox* his wife, in a lease of the entirety of the house and premises to *Gasson* for thirty years; proving that the election in 1831, or at any other time, was not considered by any of the parties, including the Plaintiff himself, as having taken place, and shewing a treating

with the property against which the election is supposed to have been made, neutralising at least the receipt of the balance of rent from the property supposed to have been elected.

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 —  
*Judgment.*

The Defendants insisted, that whatever the Plaintiff's right may have been to call upon *Mary Cox Clark* to elect, it has been lost by the lapse of time. This is answered by the dates. She did not attain twenty-one until 1831, and the bill was filed in 1847. Then and now the interest in the moiety of the premises at *Tottenham* was reversionary, *Henry Brown*, the tenant by the curtesy, being still alive. The interest in the house in *Park-street* terminated in 1819 by the expiration of the lease. The Defendant, as I understand, at the hearing being now called upon to elect, chooses to take the moiety of the premises at *Tottenham*, and must therefore account to the Plaintiff for the rents received on her account for the moiety of the house in *Park-street* from the testator's death in 1812, to the expiration of the lease in 1819. She did not indeed receive these rents herself, but they were either received by the trustee, *Crook*, or by her father for her use, and she, electing to take against the will, is bound to make good to the disappointed parties the value of the property intended for them.

The costs of the suit must remain to be considered. In my view of the case, the Plaintiff has failed in contending that the Defendant *Mary Cox Clark* had elected to take the half of the house in *Park-street*, and upon that ground, the Plaintiff claiming the half of the premises at *Tottenham*, it became necessary to make a case of notice against the parties claiming under the mortgage, and under the marriage settlement, all which has become useless expense. I am, therefore, of opinion that the bill must be

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dismissed, with costs, as against such parties; and as against *Mary Cox Clark* and her husband, so much must be dismissed, with costs, as prays that it may be declared that an election had been made.

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Feb. 18th.

PURCHASE v. SHALLIS.

A testator bequeathed "an annuity of 21*l.* per annum, which I purchased from J. G." The testator never had an annuity of that amount, but he had purchased from J. G., for 300*l.*, an annuity of 46*l.* per annum, and had insured the life of J. G. at an annual premium of 25*l.*, and had made an entry in his books of "300*l.* lent to J. G. at 7 per cent., 21*l.*: 25*l.* premium on policy of insurance for 300*l.*":—*Held*, that the whole annuity of 46*l.* passed to the legatee.

Where a decree which is appealed from is affirmed on the chief points, but is varied in immaterial particulars only, the Appellants will not be exempted from paying the costs of the appeal.

*JOHN SHALLIS* made his will, dated the 4th of September, 1832, which contained the following bequest: "I give to my sister, Mrs. *Maria Purchase*, a leasehold house, being No. 51, *Cloudesley Terrace, Islington*, and an annuity of 21*l.* per annum, which I purchased of and receive from Mr. *John Gibbon*. Mrs. *Maria Purchase* is to have the rent of the house and this annuity for her natural life: at her death they shall become the property of her children; the rent of the house and the interest of the annuity shall be for the sole use and benefit of Mrs. *Maria Purchase*, and shall not be under the control of any future husband."

The testator died in 1833. He had never had any annuity of the amount of 21*l.*; but in 1829 he had purchased from *John Gibbon* an annuity of 46*l.* for the life of *Gibbon*, for a sum of 300*l.*, and had effected an assurance upon *Gibbon's* life; and the annual premiums in respect of that assurance amounted to 25*l.* The policy had been kept up by the executors since the death of the testator, and a sum of 21*l.* per annum had been duly paid to the Plaintiff. *Gibbon* died in October, 1844, and the amount secured by the assurance had been paid to the executors of *Shallis*.

This bill was filed by Mrs. *Purchase* against the executors and her children, and prayed a declaration that the

Plaintiff was entitled to the whole of the annuity of 46*l.*, and also to the policy of assurance, or that the money paid in respect of the policy might be invested for the benefit of the Plaintiff and her children.

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The testator had made entries in his books respecting this annuity in the following form: "Lent *J. Gibbon* 300*l.* upon annuity, at 7*l.* per cent. interest, 21*l.*: 25*l.* premium on policy of insurance for 300*l.*" It appeared that the testator had also purchased several other annuities, and had insured the lives of the grantors; and that in his own books he had mentioned, as the amount of each annuity, the sum which remained, after deducting from the gross amount the sum which was payable for the annual premium.

The cause was first heard before the *Vice-Chancellor of England*, who decided in favour of the Plaintiff on the first point, and ordered accounts to be taken of the arrears of the annuity, with annual rests, and allowed interest at 5*l.* per cent. upon the balance from time to time; but held that the Plaintiff was not entitled to the policy.

The executors, one of whom was also the residuary legatee, appealed from this decision.

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Mr. *Bethell* and Mr. *Bazalgette*, for the Plaintiff, in support of the decree.

Argument.

The subject-matter of the bequest is an annuity purchased from *Gibbon*. The amount of it is incorrectly described; but that error will not vitiate the other part of the gift, which is sufficient in itself to pass the annuity. If there had been nothing to answer the description, the bequest must have failed; but here the only mistake is

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with regard to the amount, and that part will therefore be rejected: *Miller v. Travers* (a), *Selwood v. Mildmay* (b), *Day v. Trig* (c), *Doe d. Beach v. The Earl of Jersey* (d), *Courtney v. Ferrers* (e), *Parkes v. Bott* (f), *Carver v. Bowles* (g), *Le Gros v. Cockerell* (h), *Wigram on Wills*, pp. 54, 55, 3rd edit.

Mr. Lloyd and Mr. J. H. Law, for Defendants in the same interest.

Mr. Rolt and Mr. Hetherington, for the Appellants.

The Plaintiff assumes the point which is principally in dispute, namely, whether there is a wrong description. The testator invested 300*l.* in an annuity of 46*l.*, and effected an assurance in order to secure the principal. That assurance cost him 25*l.* a year, which, being deducted from the annual sum of 46*l.*, left him an annuity, or an amount of annual income of 21*l.*, and the testator mentioned it in that manner in his own books. There is, therefore, a correct description of this particular item of his property; and an annuity of 21*l.* is all which he intended to bequeath: *Wigram on Wills*, p. 12, Prop. III. In *D'Aglic v. Fryer* (i), the testatrix bequeathed all the money funded by A. B. in her name, in the Long Annuities, 50*l.* per annum, to her godson. The money funded by A. B. had purchased an amount of 65*l.* Long Annuities, but it was held that 50*l.* only passed to the legatee.

Mr. Bethell was not called upon to reply.

(a) 8 Bing. 244.

(b) 3 Ves. 306.

(c) 1 P. Wms. 286.

(d) 1 B. & Ald. 550.

(e) 1 Sim. 137.

(f) 9 Sim. 388.

(g) 2 Russ. & My. 304.

(h) 5 Sim. 384.

(i) 12 Sim. 1.

The LORD CHANCELLOR :—

It is quite clear that the testator meant to give what he himself received ; and although he only received 21*l.* a year in money, yet he also received the benefit of 25*l.* a year, which was invested in insuring the grantor's life. In order to keep them separate, he divided the annuity into two parts ; namely, 21*l.* a year which he received as clear income, and 25*l.* a year which he paid in order to keep it perpetual ; that is, to secure a return of the purchase-money on the expiration of the life.

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No case has been cited similar to the present ; but that which was last cited, *D'Aglié v. Fryer*, comes nearest to it. It may be a matter of considerable difficulty, but the question is, what is the principal description ? The *Vice-Chancellor* in that case thought the principal description was 50*l.* a year Long Annuities, and that being the thing given, it was not to be affected by the additional description, which was erroneous. Where the thing described is considered as sufficiently clear to indicate the intention, the erroneous description cannot hurt. But what is the thing given here ? It is an "annuity of 21*l.* a-year, which I purchased of and receive from *John Gibbon*." There is no such annuity ; but there is an annuity of 46*l.* purchased from him, and it has only obtained the description of 21*l.* a year, because that sum remained after paying the insurance on the life. Still the thing given is the "annuity I purchased from *John Gibbon*," and the advantage of this entry is to shew how that mistake arose. So far as regards the testator himself and his own property, it is right enough, for the testator only got 21*l.* a year : but he secured the 300*l.* principal by insuring the life. Therefore the legatee is to be in the same position in which he was himself—she must have not only the 21*l.* a year, but also the means of keeping up the policy.

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No case has been cited, nor can any case be found, where there is a clear distinct gift of the subject-matter, and an erroneous description as to the extent or value of it, in which the erroneous description has been held to vitiate the gift. Here is a perfect description of the subject-matter of the bequest, as an annuity purchased from *John Gibbon*, but an erroneous, or rather, a fanciful description of it is added, as being 21*l.* a-year. The *Vice-Chancellor*, I think, very properly considered that the policy was not included in this gift, and in that case, what is there to cut down the annuity to 21*l.* a-year, which indeed is only warranted by the manner in which the testator dealt with it? I cannot but consider this as a gift of the annuity purchased from *John Gibbon*, and a description of the amount, which is not accurate according to the amount received, but which is very clearly explained by the mode in which the testator brought this annuity into account. What he would have done if his attention had been drawn to it, cannot be known. He might have reduced it, by describing it as an annuity of 21*l.* per annum, "part of what I purchased and receive of *John Gibbon*." But it is given as an annuity, as one entire thing. If a man gave a farm or house, describing it sufficiently, and mentioned the rent of it inaccurately, the inaccurate description of the rent could not vitiate the gift itself. Here we have a clear description of the thing given, and an inaccurate statement of the money to be received from it. I cannot think there is any rule of construction which would justify me in deciding that 21*l.* a year only is the subject-matter of this bequest, it being a gift not of part of the annuity, but of the annuity itself.

I do not understand how the direction for annual rests is to be supported. The personal representatives who received the annuity ought to have paid over the whole to

the Plaintiff, but only paid part of it to her. I do not think there is any question but that the Plaintiff is entitled to interest; but it is unusual to give compound interest or rests, unless there is a case of fraud, breach of trust, or wilful default in the party who ought to have paid. So far as relates to annual rests, the decree must be altered.

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Some discussion then took place, whether, as the decree was varied, the Appellants ought to pay the costs of the appeal.

The LORD CHANCELLOR said, that as the Appellants had failed on the principal point, and as the question of annual rests did not appear to have been much argued before the *Vice-Chancellor*, he thought the variation of the decree in that point ought not to relieve the Appellants from the obligation of paying the costs of an appeal, which was, generally speaking, unsuccessful.

HIRST v. TOLSON.

Feb. 27th.  
March 2nd.

THIS bill was filed by *Sarah Hirst*, and *Henry S. Hirst* her son, against the executors of *Richard Tolson*.

An attorney, to whom a clerk was articulated, died before the articles expired:—*Held*, that the Court had jurisdiction to order part of the premium paid to the attorney to be repaid out of his assets; and that, although he had covenanted to instruct the clerk "or cause him

By articles of agreement, dated in November, 1845' *Henry S. Hirst* was articulated for five years to *Richard Tolson*, who was an attorney and solicitor. *Sarah Hirst* covenanted to provide her son with necessary board, lodging, and apparel, during that term; and *Tolson* covenanted to take *Henry S. Hirst* as his clerk, and instruct him, or cause him to be instructed, in the practice or profession of an attorney and solicitor during the term

to be instructed," and his surviving partner had agreed with his executors to take the clerk for the remainder of his articles.



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of five years. A premium of 200*l.* was paid to *Richard Tolson*; and *Henry S. Hirst* served him as his articulated clerk till October, 1847, when *Tolson* died. The Plaintiffs then insisted that a proportional part of the premium, viz. 120*l.*, should be returned by *Tolson's* executors, which they refused to pay: whereupon this suit was instituted to obtain payment of such a sum as the Court should consider to be a due and just proportion of the premium of 200*l.*

The Defendants stated that *Richard Tolson*, a short time previously to his death, introduced a partner into his business, with whom they had made arrangements to take *Henry S. Hirst* for the remainder of his articles. They also insisted that 200*l.* was not more than a proper remuneration for instructing a clerk in the rudiments of his profession for the first two years, and that the Plaintiffs were not entitled under all the circumstances to have any part of the premium returned.

The cause came on to be heard before the *Vice-Chancellor of England*, who decided in favour of the Plaintiffs, and referred it to the Master to inquire what part of the premium ought to be returned. See 16 Sim. 620.

The Defendants appealed from his Honor's decision.

Argument.

Mr. Rolt and Mr. Rogers for the Plaintiffs.

A Court of equity will require a part of a premium to be returned, where the master dies before the term is expired: *Lockley v. Eldridge* (a), *Soam v. Bowden* (b), *Newton v. Rowse* (c), *Therman v. Abell* (d). In *Wadsworth v. Gye* (e),

(a) Rep. t. Finch, 124.

(b) Id. 396.

(c) 1 Vern. 460.

(d) 2 Vern. 64.

(e) Sid. 216; 1 Keb. 820.

there was a covenant on the part of the master to maintain the apprentice, which is not found in this case; but there the parties succeeded in an action at law, and recovered part of their money. In *Hale v. Webb* (a), the Plaintiff was unsuccessful; but in that case, the matter had already been adjudicated by the Chamberlain, and it was upon that ground that this Court refused to interfere. In *Ex parte Prankerd* (b), the apprentice had misbehaved, but, still a part of the premium was recovered. The same principle is acted upon in bankruptcy: *Ex parte Sandby* (c).

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Mr. R. Palmer and Mr. Amphlett for the Appellants.

The first four cases which have been cited are the only cases of this kind in which this Court has been induced to interfere. In *Lockley v. Eldridge*, the particulars of the agreement are not stated, and it appeared that the apprentice had been ill-used. In *Soam v. Bowden*, the apprentice was to be provided with "lodging and diet," and in *Wadsworth v. Gye*, where the covenant was to instruct, and to find board, the Court said, that if it had been to instruct only, as it is in this case, there would be no claim for a return of the premium. In *Newton v. Rowse*, the master was ill when the contract was made, and a return of part of the fee, in case of death, was contemplated by the agreement. It appears, also, from the note in *Raithby's* edition, that there was fraud in that case.

[The LORD CHANCELLOR.—If the Court had proceeded on that, it would have required the whole premium to have been repaid.]

The claim in this case arises entirely in consequence of

(a) 2 Bro. C. C. 78.

(b) 3 B. & Ald. 257.

(c) 1 Atk. 149.

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the death of the master; but in *Blundell v. Brettargh* (a) Lord Eldon observed, that "the death of one of the parties could not be considered as an accident against which this Court would relieve." The *Vice-Chancellor's* decree was grounded upon the assumption that there was a legal liability; but the covenant is "to instruct or cause to be instructed," and the executors are willing to cause the Plaintiff to be instructed by the partner of the master. It was, however, held in *Wadsworth v. Gye*, that the covenant to instruct ceased at the death of the master, and the rule of law is so stated in *Williams on Executors*, 1501. The enactments of the 32 Geo. III, c. 57, proceeded on the same principle. As to the case of *Ex parte Sandby*, the master became bankrupt: that was his own act, and therefore proof was allowed for the premium.

[The LORD CHANCELLOR.—That was not on account of the covenant at all. It was merely on the equity of the case—an equity which arose from the consideration having been paid, but the instruction not having been given in return for it. In *Hale v. Webb* the principle was adopted, that the Court might order the premium to be returned, but it there refused to do so on other grounds. In *Stokes v. Twitchen* (b) Lord C. J. Gibbs said, "Supposing the Plaintiff to be an innocent party, she would certainly be entitled to recover the money so paid, as being paid without consideration." That shews his opinion of the principle, although he decided against the Plaintiff on the ground of her having been a party to a fraud on the revenue.]

*Cuff v. Brown* (c), *Ex parte Bayley* (d), *In re Thompson* (e), and *Hare v. Groves* (f), were also cited.

Mr. Rolt replied.

(a) 17 Ves. 241.  
 (b) 8 Taunt. 497.  
 (c) 5 Price, 297.

(d) 9 B. & C. 691.  
 (e) 1 Exch. Rep. 864.  
 (f) 3 Anst. 687.

The LORD CHANCELLOR:—

It is certainly singular that there should appear so much more authority applicable to this case in former times than of recent date. It is an unfortunate matter; but I should consider it more unfortunate if I thought it necessary for the parties to go to a court of law, and then to come back here. The case is one which frequently occurs; namely, there is an articed clerk, and before the term of his articles has expired the master dies; the clerk loses the benefit for which he contracted and for which his friends paid a premium; and the question is, what is the remedy to which the articed clerk is entitled, in consequence of his not having had the instruction which he ought to have received? The administration of the estate of the master is under the direction of this Court; and the question is a proper one for this Court to entertain, whether the claim is at law or in equity. The Court is not in the habit of sending all creditors to law who come here to prove their debts; and although on a purely legal point this Court will not take upon itself to decide, but will send the parties to law, still it is not at all the necessary practice of the Court. I cannot but say that the personal representatives would have acted better, if they had not raised these objections to so perfectly honest a claim for a return of part of the premium; but as the question is raised I must decide upon the strict rights of the parties.

In the first place, if this were a mere question of covenant, this Court would probably have declined to give any decision. The claim would then only exist in damages, which a jury would assess. But, on the other hand, if, independently of the right under the covenant, there is a right existing which arises from the nature of the transaction itself, and which would have existed without any covenant, namely, a right to have part of the money re-

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*Judgment.*

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paid, because part of the consideration had failed, that is a ground for the interference of this Court. It is a kind of equitable action for money had and received, and the transaction gives to the party whose money was advanced a right to recover part of it back. Without going into the old cases, there is the observation of Lord C. J. *Gibbs*, in *Stokes v. Twitchen* (a), which I have already quoted. The only question discussed there was, whether there was fraud in the articles; and Lord C. J. *Gibbs* was of opinion that the Plaintiff, as the mother of the apprentice, ought not to recover, because there had been an attempt to defraud the revenue. It was a question of violation of an Act of Parliament; which Act provided, that any such violation should make the articles void. Therefore, if it had not been for that objection,—if there had been no violation of the Act, which the Court considered the Plaintiff as having consented to,—she might have recovered.

Now, whether the consideration fails in consequence of the deed not being of a binding character, or in consequence of the death of the party before the expiration of the term, is immaterial. It is like the case of a marine insurance, where the voyage is not made, nor the risk incurred, and where, consequently, the premium may be recovered by the party who paid it. Here the party pays money for instruction which he cannot enjoy; therefore his right to recover it is quite unconnected with the covenant. Upon such a state of things the authorities establish, that an equity arises from the transaction, independently of the covenant. If that be so, has the party a right to come against the intestate's estate? No one can doubt it. There does not seem to have been any question raised in the cases in *Vernon* as to the jurisdiction of this Court; it was not only entertained to that extent, but it was

(a) 8 Taunt. 497.

carried further than is asked for by this suit. In *Newton v. Rowse* (a), it is difficult to ascertain upon what principle the Court interfered in apportioning the sum; but it is a distinct authority for an apportionment, and it leaves quite untouched the decisions, so far as they establish the jurisdiction. There are no modern cases opposed to the older authorities. In *Hale v. Webb* (b), Lord *Kenyon*, M. R., having the full matter before him upon an application against the master for a return of the premium, the question arose whether this Court had jurisdiction. The Court decided the case upon special grounds, namely, that the parties had agreed to cancel the articles. Still, if the Court has jurisdiction against a living master, *à fortiori* it must have it against the estate of a deceased master. That was the case in Lord *Kenyon's* time, and the principle was established long before his time, and has since been acted on at law; and is it reasonable to say that this Court has not jurisdiction in the present case? The only matter for consideration is, whether this is a case in which the claim can safely be adjudicated upon in this Court, or whether it is necessary to send the parties to establish their right at law, and then come back to this Court. I think that there is a debt at law and also a debt in equity; and that the case is one in which the Plaintiffs, having such debt, have a right to have it paid in the due administration of the estate.

I think the *Vice-Chancellor's* decree right, and I must dismiss the appeal, with costs.

(a) 1 Vern. 460.

(b) 2 Bro. C. C. 78.

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April 22nd.  
May 1st.

CARLISLE v. THE SOUTH EASTERN RAILWAY  
COMPANY.

An Act of Parliament, which authorised the transfer of a particular portion of a projected railway from one Railway Company to another, enacted, that if that portion of the railway was not completed within three years from such transfer, it should not be lawful for the Railway Company to pay any dividend until the whole should be completed. That portion was not completed within the three years:—*Held*, that the Company were prohibited from paying any dividend on any of their shares, and not merely upon the capital embarked in that particular portion of their undertaking.

*Held*, also,

that one shareholder might sue on behalf of himself and other shareholders to restrain the payment of any future dividend; and that, notwithstanding he had received interest on his shares since the expiration of the three years, he being then ignorant of the enactment in question.

*Held*, also, that the Plaintiff, being the holder of some shares of a particular class which were not entitled at present to participate in any dividend, was not entitled, on a bill so framed, to an injunction to restrain the payment of a dividend already declared, the other shareholders who were interested in those dividends not being parties to the record or represented.

Whether, in such a case, any adequate remedy exists, without making all the shareholders parties, *quære*.

THIS was a motion to discharge two orders of the *Master of the Rolls*, dated the 23rd of March, and the 17th of April, 1850 (a). By the former order, the *South Eastern Railway Company* and the Directors were restrained from paying any dividend upon any shares in the said Company, until so much of the railway by the *Brighton, Lewes*, and *Hastings Railway Act* authorised to be made as had been transferred to the *South Eastern Railway Company*, should be opened to the public for traffic; and by the latter order the injunction was extended to restrain the Company and the directors from paying any dividends which had already been declared upon the shares.

The bill was filed by *Thomas Carlisle*, on behalf of himself and all other the shareholders in the *South Eastern Railway Company*, except the Defendants, against the Company and the existing board of directors.

By the *Brighton, Lewes*, and *Hastings Railway Act*, *Hastings, Rye*, and *Ashford Extension*, which was passed in 1845, the *Brighton, Lewes*, and *Hastings Railway Company* were authorised to make a railway from a point in the parish of *St. Mary, Bulverhithe*, in *Sussex*, to *Ashford in Kent*, so as to form a junction between the *Brighton, Lewes*,

(a) This application was heard by the *Lord Chancellor* at his private residence.

and *Hastings Railway* and the *South Eastern Railway*. And the *Brighton, Lewes, and Hastings Railway Company* were thereby authorised to transfer to the *South Eastern Railway Company* all the powers conferred upon the former Company by that Act, with reference to the purchase of land, and the execution of a portion of that railway, which portion when executed was to become part of the undertaking of the *South Eastern Railway Company*. And it was further enacted, that it should be lawful for the last-mentioned Company to raise £10,000 to make that portion of the railway; and then followed an enactment by the 42nd sect., that if so much of the railway by that Act authorised to be made as might be transferred to the *South Eastern Railway Company*, should not be completed within three years from the completion of such transfer, it should not be lawful, after the expiration of the said period, for the *South Eastern Railway Company*, unless authorised by Parliament so to do, to pay any dividend until the whole of the said railway should be opened to the public for traffic.

An indenture was afterwards executed, dated the 21st of August, 1845, by which the *Brighton, Lewes, and Hastings Railway Company* transferred to the *South Eastern Railway Company* all the powers conferred upon them by the Act, with reference to that portion of the line.

A general meeting of the latter Company was held in September, 1845, at which a resolution was passed, authorising the raising of a further capital for the purposes of that portion of the railway before mentioned, together with several other railways and works; and it was resolved that no dividend should be payable in respect of any such new share, until six months after the day to which a dividend should have been declared on the then existing shares of the Company, next following the opening for traffic of

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the latest in point of execution of the new lines of railway and works referred to in the preceding part of that resolution ; and that it was expedient to apply to Parliament for powers to provide funds for making certain other railways ; and that the additional capital should be raised by new shares : with a proviso similar to the last, that no dividend should be paid on the new shares till after the completion of all the projected works.

Shares were issued shortly afterwards, which were described in the accounts of the Company, as "The Consolidated No. 3 Shares."

Several Acts of Parliament were subsequently passed authorising the Company to make other railways, and to raise further capital.

A general meeting of the Company was held in September, 1846, when it was resolved to raise a sum of 2,850,000*l.* by shares, upon the terms of the resolutions of the meeting of September, 1845 ; and the shares issued in pursuance of this resolution were described in the accounts of the Company as "The No. 4 Shares." The Plaintiff purchased 100 of the No. 4 shares.

The period of three years from the completion of the transfer expired on the 21st of August, 1848 ; but the portion of the line from *St. Mary, Bulverhithe*, to *Ashford*, was not yet completed. The directors had, however, continued to pay half-yearly dividends on the shares in the Company, and intended to procure another dividend to be declared at a meeting which was to be holden on the 14th of March, 1850.

The bill charged that the payment of any dividend since August, 1848, was illegal ; that neither the Plain-

tiff, nor any of the holders of No. 4 shares, had ever received any dividend on their shares, but that, in order to induce payment of the calls on No. 3 shares and No. 4 shares, the Company had resorted to the expedient of paying interest at the rate of 5*l.* per cent. per annum upon the amount paid on those shares, which interest had been paid out of the capital of the Company.

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The bill also charged, that there was not now sufficient capital of the Company raised on the No. 3 shares, remaining to complete the portion of the railway so transferred as before mentioned.

The bill prayed a declaration, that, under the circumstances aforesaid, the payment of any dividends was illegal; and that the Company and the directors might be restrained from paying dividends, in the terms in which the injunction was granted.

The bill was filed on the 14th of March, 1850, and on the same day a general meeting of the shareholders of the Company took place, and a further dividend was declared. On the 23rd of March, the *Master of the Rolls* granted an injunction to restrain the payment of future dividends; but some discussion having arisen as to the Company having sufficient funds for the completion of this particular portion of the railway, and applicable thereto, the matter was again mentioned to his Lordship on the 17th of April, when the propriety of restraining the Company from paying the dividend, which had been declared at the meeting on the 14th of March, was considered, and his Lordship extended the injunction, and restrained the payment of that dividend also.

These were the two orders which the Defendants now sought to discharge.

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 Statement.

It was contended, on behalf of the Company, that the Plaintiff had attended general meetings, and had received interest on his shares, since the expiration of the three years from the completion of the transfer, and that he had thus acquiesced in the payment of dividends, and was precluded from raising the objection. The Plaintiff on the other hand stated, that he was not aware of the existence of the 42nd sect. of the Act above mentioned, until a short time before the filing of this bill. It was also contended, on the part of the Company, that, as the Plaintiff was precluded by the terms on which the No. 4 shares were issued, from receiving any dividends at present, he was not authorised to file a bill on behalf of the holders of the old shares, whose interest was promoted by receiving dividends; and therefore, they and the Plaintiff had no common interest on that point.

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Argument.

Mr. R. Palmer and Mr. J. Baile appeared for the Company.

Mr. Rolt and Mr. Bovill for the Plaintiff.

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The LORD CHANCELLOR:—

Judgment.

So far as regards the several matters discussed before the *Master of the Rolls*, and decided by his judgment, I certainly concur in the opinions he has expressed. After a careful perusal of the enactment upon which the question depends, it is, I think, impossible to give to the word "dividend" any other meaning than that of a dividend of the *South Eastern Railway Company*; it is the only dividend which could be made. I think, also, that there is no proof of any such acquiescence as can bar the Plaintiff

of the equity he seeks. There is not only no proof of the knowledge of the adverse right, and consent by conduct in the enjoyment of it, but a positive denial of any such knowledge. The Plaintiff had, indeed, the means of knowledge from the contents of the Act under which he derived his title; and this would have deprived him of his equity in some cases, as against a competing equity, but cannot deprive him of a right to enforce the provisions of an Act of Parliament, in favour of others having no claim at law or in equity. So much of the bill as seeks the restraint upon payment of future dividends is simply to prevent the violation of the Act of Parliament, and to prevent the distribution of any of the Company's funds as dividends, until certain works have been completed. This being a duty common to all the shareholders, and probably a benefit to all, the bill on behalf of the Plaintiff and all other shareholders except the directors, would be one of the ordinary description, in which the practice of the Court permits such representations in pleading; and so far I think the pleadings proper, the case proved, and the injunction right.

But here the difficulty of the case appears to me to begin. The dividend was declared on the 14th of last March, at which time there was no injunction; and however illegal and improper it may have been so to violate the provisions of the Act, the question I am considering is, whether the Plaintiff in this suit, constituted as it is with respect to parties, can maintain the injunction, so far as regards the dividend so declared, supposing the injunction against the payment of such dividend had been the only relief prayed. The Plaintiff, and others entitled to shares No. 3, &c., are not entitled at present to any dividend, but the great body of the shareholders of the *South Eastern Railway Company* are, or rather would be, but for the prohibition upon which the injunction is founded. How

1850.  
 CARLISLE  
 v.  
 THE SOUTH  
 EASTERN RAIL-  
 WAY CO.  
 Judgment.

1850.  
 CARLISLE  
 v.  
 THE SOUTH  
 EASTERN RAIL-  
 WAY Co.  
 Judgment.

are these other shareholders represented? Not by the Plaintiff and those associated with him, which in terms they are, because the bill contends that the dividend so declared ought not to be paid; but all these other shareholders are interested in contending that it ought, and in insisting that whatever may be the rule as respects the Company, the declaration of the dividend gave to each and every of those in whose favour it was made a separate and distinct right to the sum so allotted to him, and thus created an interest directly opposed to the case made and the relief prayed by the bill. I do not inquire what remedy each shareholder may have for a dividend declared in his favour and not paid; but the payment being to be made out of the funds of the Company, the claim must be adverse to the Company, and cannot be represented by those who take upon themselves the interests of the Company. The cases of *Davis v. The Bank of England*(a) and *Coles v. The Bank of England*(b), shew, at least, that at law the title of a party to whom a dividend is payable is recognised as a separate and independent right. As to the dividend declared, therefore, there is not only no community of interest, but a direct adverse interest, as between the Plaintiff and those other shareholders; and no bill on behalf of the two can be maintained. This being so, these shareholders are not represented at all, for there are no Defendants representing their interests, if that would have been sufficient, which I by no means assume. The only Defendants are the directors, as such, there being, as I believe, no allegation of their being shareholders. The result is, that these shareholders, whose dividends are thus stopped, are not in any shape parties to the suit, nor can they in any manner intervene in it; but they are most grievously affected by the injunction if it ought not to have interfered with the dividend declared. And in what

(a) 2 Bing. 398 ; 5 B. & C. 185.

(b) 10 A. & E. 449.

situation does the order leave them and the Company? The injunction cannot deprive these shareholders of any remedy they may be entitled to at law or in equity for payment of the declared dividend, or protect the Company against any such claim. Each shareholder may therefore institute proceedings for that purpose, and the Company, if they can support an injunction, would have to obtain it in each particular case; a course of proceeding leading to infinitely more litigation and difficulty than would arise from making all the shareholders parties to the Plaintiff's bill, if that were necessary. In neither case would the course of proceeding be satisfactory, or well adapted to meet the exigencies of the case; but this possible state of things has been foreseen and no remedy suggested. In *Mozley v. Alston*(a) I am reported to have said, that "where the grievance complained of is common to a body of persons too numerous to be all made parties, the Court has permitted one or more of them to sue on behalf of all, subject, however, to this restriction, that the relief which is prayed must be one in which the parties whom the Plaintiff professes to represent have all of them an interest identical with his own; for if what is asked may, by possibility, be injurious to any of them, those parties must be made Defendants, because each and every of them may have a case to make adverse to the interest of the parties suing: *Taylor v. Salmon*(b), *Wallworth v. Holt*(c). If, indeed, they are so numerous that it is impossible to make them all Defendants, that is a state of things for which no remedy has yet been provided." In *Richardson v. Larpent*(d) and *Evans v. Stokes*(e), the difficulty occurred, but the objection prevailed.

1850.  
 CARLISLE  
 v.  
 THE SOUTH  
 EASTERN RAIL-  
 WAY Co.  
 Judgment.

Many cases may occur in which this difficulty must lead to a failure of justice, and it is much to be wished that some

(a) 1 Ph. 798.

(b) 4 My. & Cr. 134.

(c) Id. 619.

(d) 2 Y. & C. C. C. 507.

(e) 1 Keen, 24.

1850.  
 CARLISLE  
 v.  
 THE SOUTH  
 EASTERN RAIL-  
 WAY CO.  
 Judgment.

remedy could be suggested for it. I have in this instance only to deal with the case as I find it upon these pleadings; and in truth the real difficulty so leading to a failure of justice, does not arise in this case. Until the dividend was actually declared, the Plaintiff's remedy was without difficulty, and his failure as to part of what he asks, arises only from his being too late in his application. Had the dividend been paid as well as declared, he could not in such a suit as this have asked for repayment from the shareholders; and for the purpose of this suit, and the form in which it is brought before me, I consider the two cases as falling within the same principle.

My order therefore is, that so much of the injunction as restrains the payment of any dividends declared before the injunction, be discharged, and that the rest of the order be affirmed.

Jan. 11th.

BEALE v. SYMONDS.

Where the prosecution of an administration suit had been neglected for several years, the conduct of it was given to parties who had been proved to be creditors, until further order.

Statement.

THIS was a motion to discharge an order of the *Vice-Chancellor of England*, dated the 11th of December, 1849, whereby it was ordered that two parties who had been reported by the Master to be specialty creditors of *Samuel Beale*, the testator in the pleadings named, and six parties who had been reported to be simple contract creditors, should have the conduct of these suits *until further order*; and that these causes should be transferred from the office of *Sir William Horne* to the office of Master *Brougham*, *Sir W. Horne* having been prevented by illness from attending at his office.

The Plaintiff was the devisee, and one of the residuary legatees of the testator whose estate was being administered. The parties to the suits were the son, daughter, and grandchildren of the testator, who were all interested

under the will. The decree was made in February, 1841, and in December, 1841, there was a warrant to consider the decree. In 1843 application was made by a simple contract creditor for the conduct of the suit, but his debt was paid by the Plaintiff.

1850.  
BRALN  
v.  
SYMONDS.  
—  
Statement.

Mr. Rolt, Mr. Whitbread, Mr. Stuart, and Mr. Shapter, appeared for the different parties. *Argument.*

*Powell v. Wallworth (a), and Sims v. Ridge (b),* were cited.

The LORD CHANCELLOR said, he thought that the order of the *Vice-Chancellor* was a very proper order, and that the introduction of the words *until further order* limited the power of the creditors in a very proper manner; and that the motion should be refused, with costs: but, as Sir *William Horne* had now recovered, and attended at his office, that part of the order which transferred the suits to another Master might be omitted. *Judgment.*

(a) 2 Madd. 183.

(b) 3 Mer. 458.

*In re* THE DIRECT EXETER, PLYMOUTH, AND DEVONPORT RAILWAY COMPANY, *Ex parte* BESLEY. *June 5th.*

AN order had been made under the Joint-stock Companies Winding-up Act, for winding up the affairs of the way, and was provisionally registered. *A.* allowed his name to be inserted in the list of the provisional committee, but afterward directed it to be withdrawn, and he declined to take any shares. The provisional committee appointed a managing committee, and certain expenses were incurred, and the scheme was ultimately abandoned. *A.* then, for the first time, attended some meetings of the provisional committee, and signed an agreement, together with other members of the provisional committee, to bear equally any payments which any of them might be subjected to on account of the expenses and liabilities of the Company. *A.* paid several sums of money on account of his contribution:—*Held*, that the association was sufficiently formed to be a Company within the meaning of the Winding-up Act, and that the name of *A.* was properly inserted in the list of contributories. An association was formed for the purpose of making a rail-



1850.

In re  
THE DIRECT  
EXETER, PLY-  
MOUTH, AND  
DEVONPORT  
RAILWAY CO.,  
Ex parte  
BESLEY.

Statement.

*Direct Exeter, Plymouth, and Devonport Railway Company*, and the name of *William Henry Besley* had been inserted by the Master in the list of contributories. The Vice-Chancellor *Knight Bruce* had ordered it to be struck out. The case was now brought before the *Lord Chancellor* by way of appeal (a).

The Company was projected for the purpose of making a railway between *Exeter* and *Plymouth*, and was provisionally registered. In October, 1845, *Besley* was solicited by one of the provisional committee to become a member of the committee. Mr. *Besley* verbally assented, with the understanding that he was not to incur any responsibility. On the 7th of October, the provisional committee appointed a committee of management. On the 3rd of November, 1845, the managing committee passed a resolution as to the allotment of a certain number of shares to each member of the provisional committee.

On the 6th of November, 1845, Mr. *Besley* wrote to the secretary of the Company as follows:—

“ Sir,—I find it will not be convenient for me to take up the shares which are allotted to me as one of the provisional committee of *The Direct Exeter, Plymouth, and Devonport Railway Company*; I must, therefore, request that my name may be taken from the list; and I give you this early information, that I may be no obstacle to the shares being allotted to another person.

(Signed) “ W. H. BESLEY.”

In the minute-book of the Company was an entry with respect to a meeting of the managing committee, held on the 7th of November, as follows:—

“ Letters from Capt. *Berkley*, *W. H. Besley*, Esq., and

(a) This case was heard before Lord *Cottenham* at his private residence.

others, desiring to withdraw their names from the provisional committee, having been laid before the committee, it was resolved, that the secretary be instructed to inform any gentleman wishing to have his name withdrawn from the provisional committee, that his wish shall be complied with in the future publications of the Company."

1850.  
In re  
THE DIRECT  
EXETER, PLY-  
MOUTH, AND  
DEVONPORT  
RAILWAY CO.,  
Ex parte  
BESLEY.

Statement.

This resolution was not communicated to Mr. *Besley*, and it appeared that his name continued on such list until the order for winding up the affairs of the Company.

The scheme was afterward abandoned, and on the 31st of December, 1845, a meeting of the provisional committee was held, at which they considered the means of meeting the liabilities of the Company. It appeared that *Besley* attended that meeting, it being the first meeting of the committee that he had attended; but he stated that he was not present until all the resolutions were passed. That meeting passed a resolution, that each member of the provisional committee should pay 3s. per share on 100 shares.

On the 14th of January, Mr. *Besley* paid to the credit of the Company 15*l.*, as his contribution in respect of the liabilities of the Company, being at the rate of 3s. per share on 100 shares. On the 19th of January, 1846, Mr. *Besley*, and several other members of the provisional committee, signed an agreement to bear an equal proportion of the debts, damages, and costs which any of the persons signing the agreement might be compelled to pay in respect of the Company.

On the 2nd of March, 1846, another meeting of the provisional committee took place, at which some resolutions were passed, which were communicated to Mr. *Besley* by the following letter, dated the 12th of March, 1846, from the secretary of the Company:—

1850.

*In re*  
**THE DIRECT**  
**EXETER, PLY-**  
**MOUTH, AND**  
**DEVONPORT**  
**RAILWAY CO.,**  
*Ex parte*  
**BESLEY.**

—  
*Statement.*

"Sir,—I am instructed to forward to you, as one of the provisional committee, a copy of the resolutions unanimously adopted at a general meeting of the provisional committee, on the 2nd inst., and to request that you will pay into the bank of Messrs. *S. & Co.*, of &c., the sum thereby required, or so much as, with any previous payment you have made, will make that amount, &c. The committee hope that the payment now required will be sufficient to relieve the members of the provisional committee from further claims, and trust that each member will see that, by complying with the terms of the resolution, he will save himself from much heavier demands, and probably much personal annoyance, as the committee must give the names of defaulters to the creditors, who will no doubt immediately bring actions against them for their claims on the Company. (Signed) *H. G. Farrant*, Sec. *pro tem.*—' March 2, 1846.—At a meeting of the provisional committee held this day, it was unanimously resolved, that a particular of the claims upon the Company be left at the offices, 5, *Bedford Circus, Exeter*, and forwarded to the solicitors, for the inspection of the members of the provisional committee; that the secretary inform every member of the provisional committee, that unless 65*l.* be paid on or before Wednesday, the 26th inst., their names will be handed over to the creditors.'"

On the 25th of March, Mr. *Besley*, in pursuance of that demand, paid 50*l.* to the credit of the Company.

On the 31st of August, 1846, another meeting was held of the provisional committee, at which *Besley* was present, and at which it was resolved "that the members who are here present agree to pay the sum of 50*l.*, or such other sum as will make up, with previous payments, 115*l.*; and they determine, by every influence and power they possess, to resist or prevent any further demand being made upon

such persons as have contributed 115*l.*; that Mr. *Floud* be requested immediately to cause the creditors of the Company to apply to such provisional committee-men, and enforce payment from such as have not paid their respective contributions, in order to wind up the affairs of the undertaking as soon as possible."

Mr. *Besley* had paid up the whole amount of 115*l.*

Mr. *Rozburgh* appeared for the official manager, in support of the motion to discharge the order of the Vice-Chancellor; and

Mr. *Karslake*, in support of the order.

The following cases were cited: *In re The Vale of Neath, &c. Brewery Company, Ex parte Morgan* (a), *Ex parte Hollinsworth, In re The Ipswich and Southampton Railway Company* (b), *In re The Direct London and Exeter Railway Company, Ex parte Parbury* (c), *In re The Universal Salvage Company, Ex parte Lord Mansfield* (d), *Bell v. Lord Mexborough* (e), and *Bailey v. Macaulay* (f).

#### THE LORD CHANCELLOR :—

I cannot, for a moment, entertain the idea that this Company had not advanced to that state which made it the proper subject of an order under the Winding-up Act. It may be quite right to draw within the operation of the Act an immense mass of Associations or Companies (whichever you may call them), and they may require as much the aid of the Act as if they had gone on further. Whether you call it a Company or an Association, or whatever name it may go by, is quite immaterial, because it is a Company in fact; it has become a Company within the

1850.

*In re*  
THE DIRECT  
EXETER, PLY-  
MOUTH, AND  
DEVONPORT  
RAILWAY CO.,  
*Ex parte*  
BESLEY.

*Statement.*

*Argument.*

*Judgment.*

(a) 1 Hall & T. 320; 1 Mac.  
& G. 225.

(b) 5 Railw. Cas. 623.

(c) 3 De G. & S. 43.

(d) 1 Hall & T. 593.

(e) 5 Railw. Cas. 149.

(f) 19 L. J., Q. B., 73.

1850.

*In re*  
THE DIRECT  
EXETER, PLY-  
MOUTH, AND  
DEVONPORT  
RAILWAY Co.,  
*Ex parte*  
BESLEY.

—  
*Judgment.*

meaning of the Winding-up Act, and an Association or a Company giving the Court power to wind up its affairs. The only question is, whether this gentleman has or has not rendered himself liable as a contributory to any part of the expenses incurred in this Association, commencing in a provisional committee, appointing a committee of management, and afterwards, finding their affairs could not proceed, going before the Master to have their affairs wound up.

The facts which appear before me are these:—That Mr. *Besley* was originally ostensibly a member, and that he consented to his name being put down as a member of the provisional committee for the purpose of constituting the Company. At a subsequent period he was desirous, according to his own statement, of withdrawing. By some means or other he had ascertained that shares were or would be allotted to him, and he then gave a notice that he did not want any shares, and that he wished to withdraw, and he gave an authority to the secretary to withdraw his name. That was not acted upon; at any rate, his name remained, and it remained there until the last moment as a member of the provisional committee. In the mean time things go on. The provisional committee appoint a committee of management, and expenses, which are incidental to the commencement of such proceedings, are necessarily incurred. Other expenses arise. Mr. *Besley* does remain a provisional committee-man. It is not necessary to consider whether that mere fact, without more, would make him liable to anybody. That part of the case does not require any observation, because there is so much more as to render it unnecessary to consider what the effect of that would be. But he does remain a provisional committee-man; he attends meetings of the provisional committee, which appoints a managing committee; the managing committee reports on the expenses incurred; he concurs in an order for the purpose of liquidating those

expenses, pays his share, and so he continues. He still allows his name to remain; and although I cannot say that he was under any mistake as to the course he adopted when he found his name was not withdrawn, yet I cannot help being struck with the fact, that after he knew his name remained there, he did not take any further course to get it taken off. But then comes this fact: it is by his name remaining, coupled with the fact of his knowing it, that his liability arose, and he acts on that liability and pays his share. Why did he pay? Was he conscious that his apparent liability arose merely because his orders had not been carried into effect? No such statement appears; but there is the fact of his agreement to pay a proportion of the expenses. I cannot have better authority for saying he is liable, than his own act (a). It is not an act done in mere ignorance of the law, but it is an admission of facts which, if established one way, would shew his liability to be considered a contributory beyond all question. In that view it is that the fact of payment becomes important, because he recognises circumstances which, under any view of the law, would render him liable to contribute. I do not know that anything can be more dangerous than, when a man's overt acts shew an acknowledgment of a liability, to permit him to say, "I did so, no doubt, and it appears I acknowledged my liability, but I did so under a false impression of the law." No such impression appeared to have operated on his mind at the time; but, on the contrary, all the facts shew that he considered he was so far connected with the Company as to render him liable to some extent to pay. Looking at the words of the Act I think he falls within the description of the Act; that the Master was right in including him in the list; and therefore, of course, that the *Vice-Chancellor's* order was wrong in striking him off.

(a) See *Ex parte Roberts*, post, p. 391.

1850.

*In re*  
THE DIRECT  
EXETER, PLY-  
MOUTH, AND  
DEVONPORT  
RAILWAY CO.,  
*Ex parte*  
BESLEY.

*Judgment.*

1860.

June 20th.  
July 15th.

*In re* THE WOLVERHAMPTON, CHESTER, AND  
BIRKENHEAD JUNCTION RAILWAY COMPANY,  
*Ex parte* COTTLE.

A.'s name was, with his consent, placed on a provisional committee, and inserted in the usual advertisements. He never acted as a member of the committee, nor did any act except authorising his name to be put on the list:—*Held*, that he was not liable as a contributory.

—  
*Statement.*

AN order had been made, under the Joint-stock Companies Winding-up Act, for winding up the affairs of the *Wolverhampton, Chester, and Birkenhead Junction Railway Company*, and the name of *John Morford Cottle* had been ordered by the *Vice-Chancellor of England* to be placed on the list of contributories. He had been excluded from the list by the Master, but that decision was reversed by the *Vice-Chancellor*, and the question as to the liability of *Mr. Cottle* was now brought before the Lords Commissioners by way of appeal from his Honor's order.

The Company was projected in 1845, and application was made to *Mr. Cottle* to become a member of the provisional committee. His reply, dated the 26th of September, was addressed to the *London* solicitor of the Company, and was in the following terms:—

“ I have received from Messrs. *Brown & Clarke*, of *Coventry*, the prospectus of the *Wolverhampton and Birkenhead Railway*; I shall have no objection to comply with your request, and will thank you to insert my name, and also that of my friend *Mr. Hyde Clarke*. The latter gentleman's name will be of consequence to you, as having considerable property in *Cheshire*, and being locally interested.”

*Mr. Cottle* was inserted in the list of the provisional committee in the advertisements of the Company, but

never attended any meeting, or did any act. In October, 1845, a resolution was passed, and entered in the books of the Company, that every provisional committee-man should be entitled to have one hundred shares, but must hold twenty-five shares in order to qualify him for his office. In compliance with that resolution, a letter was sent to Mr. Cottle, informing him that twenty-five shares were allotted to him; but he sent no answer. The following letters were afterward written and sent:—

1850.  
In re  
THE WOLVER-  
HAMPTON,  
CHESTER, AND  
BIRKENHEAD  
JUNCTION  
RAILWAY CO.,  
Ex parte  
COTTLE.  
Statement.

“ Mr. W. S. Vardy, 18, Finsbury-place, London, Solicitor to Wolverhampton, Chester, and Birkenhead Railway.

“ Dear Sir,—Mr. Hyde Clarke is chairman to the North Cheshire Railway; this should be mentioned in your prospectus of the Birkenhead. I beg to say, Mr. H. Clarke, Mr. Alexander, Mr. Gatty, and myself, (in consequence of the rather unusual steps of the acting directors in borrowing money before the allotments,) have made up our minds to request yourself and other solicitors to give us an indemnity from all liability as members of the provisional committee of the Wolverhampton, Chester, and Birkenhead Railway, or, I am sorry to say we shall feel obliged to withdraw our names immediately. Please to furnish it, and forward it to Messrs. Smith & Noble, including all our names in the same indemnity. Yours faithfully,  
J. M. COTTLE.

“ Oct. 15, 1845. 10, Clarendon-square, Leamington.”

“ To Messrs. Smith & Noble, Solicitors to the Wolverhampton, Chester, and Birkenhead Railway.

“ Gentlemen,—I find that my name has been placed on your committee list, contrary to my letter to Mr. Vardy, of October 15th. I hereby request you to remove my name from the above railway. Yours faithfully,

“ J. M. COTTLE.”



1850.

*In re*  
THE WOLVER-  
HAMPTON,  
CHESTER, AND  
BIRKENHEAD  
JUNCTION  
RAILWAY Co.,  
*Ex parte*  
COTTE.

Statement.

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*“Wolverhampton, Chester, and Birkenhead Railway,  
Birmingham, Nov. 8th, 1845.*

“Sir,—In pursuance of your request, I have taken your name from the provisional committee of the above-named railway. Yours most obediently, “JOHN SMITH.

“To J. M. Cottle, Esq., Leamington.”

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Argument.

Mr. Rolt, Mr. W. M. James, and Mr. Hislop Clarke, in support of the motion.

The Appellant never did any act which brought him under any legal liability at law to any creditor of the Company: *In re The North of England Joint-stock Banking Company, Ex parte Hall* (a). He never accepted or agreed to accept any shares. The fact of his having agreed to become a member of the provisional committee will not make him liable in respect of acts done by other members of the committee, which he never sanctioned: *Burnside v. Dayrell* (b). In *Reynell v. Lewis*, and *Wyld v. Hopkins* (c), Chief Baron Pollock says, “The agreement to become a provisional committee-man means neither more nor less than what the words express, viz. an agreement to act on the provisional committee in carrying into effect the preliminary arrangements for petitioning Parliament for a bill, and so to promote the scheme.” The Appellant was certainly not a “member” of the Company, for he would have had no claim to participate in the profits: 11 & 12 Vict. c. 45. s. 58.

Mr. R. Palmer and Mr. Glasse, in support of the Vice-Chancellor’s order.

(a) 1 Hall & T. 580.

(b) 19 L. J., Exch., 46.

(c) 15 M. & W. 530.

The question is not, whether the Appellant is or not liable at law to pay a debt due to a creditor, but whether he is liable, as between himself and his co-speculators, to contribute towards the payment of debts contracted in promoting the undertaking. At law, such associations as these are not partnerships, but they are within the Joint-stock Companies Winding-up Act: *Ex parte Barber* (a). A man can scarcely be placed upon a provisional committee, without becoming liable to contribute to some of the expenses, even if they are no more than the insertion of his name in the advertisements; but if he is liable in any degree, he is a contributory: *Ex parte Hawthorn* (b), *Ex parte The Earl of Mansfield* (c), *Ex parte Besley* (d), *Ex parte Cooke* (e), *Ex parte Holinsworth* (f), *Parbury's case* (g).

1850.  
In re  
THE WOLVER-  
HAMPTON,  
CHESTER, AND  
BIRKENHEAD  
JUNCTION  
RAILWAY CO.,  
*Ex parte*  
COTTLE  
Argument.

Mr. Rolt, in reply, contended that a provisional committee-man was not subjected to any liability by the acts of other committee-men in which he did not join; that the point was, could the Appellant be made liable at law: *Lefroy v. Gore* (h). Courts of law and Courts of equity did not put different constructions upon the rights and liabilities of parties: *Bell v. Lord Mexborough* (i).

LORD COMMISSIONER ROLFE delivered the judgment of the Court:—

In this case the Master had excluded the name of Mr. Cottle from the list, but his Honor the Vice-Chancellor of England, on a motion by the official manager, overruled the judgment of the Master, and ordered Mr. Cottle's name

July 15th.  
Judgment.

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|-----------------------------|------------------------|
| (a) 1 Hall & T. 238; 1 Mac. | (e) 3 De G. & S. 148.  |
| & G. 176.                   | (f) Id. 7.             |
| (b) 1 Hall & T. 225; 1 Mac. | (g) Id. 43.            |
| & G. 49.                    | (h) 1 J. & L. 571.     |
| (c) 1 Hall & T. 593.        | (i) 5 Railw. Cas. 149. |
| (d) Ante, p. 374.           |                        |

1850.

*In re*  
 THE WOLVER-  
 HAMPTON,  
 CHESTER, AND  
 BIRKENHEAD  
 JUNCTION  
 RAILWAY CO.,  
*Ex parte*  
 COTTLE.

*Judgment.*

to be included among the contributories. [His Lordship here stated the facts of the case.] His Honor the *Vice-Chancellor of England*, in ordering Mr. *Cottle's* name to be placed on the list, stated that he founded his judgment on the ground, that, by allowing his name to stand on the provisional committee, Mr. *Cottle* became liable *in foro conscientie* to contribute rateably with the other members of that body. And again, his Honor says, that while Mr. *Cottle* allowed his name to stand on the provisional committee, he might become liable to the consequences of any order that a provisional committee-man might give.

We feel compelled to dissent altogether from this view of the law. The cases of *Reynell v. Lewis* and *Wyld v. Hopkins* (a) establish conclusively, that at law, a person, by authorising his name to be placed on the provisional committee, gives no authority to any other member of the committee to enter into any contract whatever. All that a person does by becoming a member of a provisional committee, is to signify his approbation of the scheme, and to engage that he will concur with the others in such acts as he may approve of, and may think conducive to the objects in view. If, indeed, he expressly or impliedly gives authority to any one or more of the committee to act for him, then whatever is done in pursuance of that authority is of course obligatory on him in such a case; if goods are purchased, he may be sued by the seller; or if work is done, he may be sued by the party who has done the work; and if any other committee-man jointly liable with him has paid for the goods or for the work, he may be sued by that party for contribution. But the result of the two cases at law to which we have referred (and very many cases have since been decided on the same principle) is, that the mere fact of becoming a member of a pro-

(a) 15 M. & W. 517.

visional committee gives no authority whatever to any one. It was indeed argued before us, that although a person by being on a provisional committee does not make himself liable to third persons for dealings between them and other members of the committee, yet that he does become liable, as between himself and such other members, to contribute rateably in respect of their outlay. But this is an entire fallacy. The obligation to contribute is a legal obligation, and may be enforced by action at law, though often far more conveniently in equity, and, in the case of several persons jointly contracting for their common benefit, arises from an implied contract on the part of every joint contractor to pay his share of the joint expense. But, when once it is established that the mere fact of being on the provisional committee does not make a party to be a joint contractor with those who act and make contracts, the whole substratum fails; there is no joint contract, and so no liability to contribute.

On these grounds we feel bound to differ from the *Vice-Chancellor of England*, and to say that Mr. Cottle did not become liable to contribute to any of the expenses incurred; and the order placing him on the list must therefore be discharged. Mr. Cottle will have the costs of the motion before the *Vice-Chancellor of England*.

NOTE.—This decision was affirmed by the House of Lords, 9th August, 1850: 2 H. L. Cas. 647.

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 HAMPTON,  
 CHESTER, AND  
 BIRKENHEAD  
 JUNCTION  
 RAILWAY Co.,  
*Ex parte*  
 COTTLE.  
*Judgment.*

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June 26th.  
July 4th  
& 15th.

*In re* KOLLMANN'S RAILWAY LOCOMOTIVE  
AND CARRIAGE IMPROVEMENT COMPANY,  
*Ex parte* BERESFORD.

The deed of settlement of a Company purported to be made between persons referred to and described as being named in a schedule, of the first part, and persons named and described, of the second and third parts. There was no schedule to the deed, which, however, was executed by numerous persons besides those of the second and third parts. One of the clauses authorised the directors to declare forfeited the shares of any party to the deed who did not execute it; and another clause directed that, on a transfer, the transferee should take on himself the antecedent liability of the transferor. An allottee of shares paid his deposit

THE affairs of *Kollmann's Railway Locomotive and Carriage Improvement Company* had been ordered to be wound up under the Joint-stock Companies Winding-up Act. The name of *Francis Marcus Beresford* had been excluded by the Master from the list of contributories, and the Vice-Chancellor *Knight Bruce* had concurred in the opinion of the Master. This was an application by way of appeal to have *Beresford's* name inserted in the list of contributories.

The particulars of the case are reported in 3 *De Gex & Smale*, 175.

Mr. Bacon and Mr. Glasse, for the official manager, cited *In re The Vale of Neath and South Wales Brewery Company, Ex parte Morgan*(a), and contended, that, as *Beresford* had never transferred the shares, in the mode pointed out by the deed of settlement of the Company, his liability as a shareholder had not ceased.

Mr. W. T. S. Daniel, in support of the order of the Vice-Chancellor, insisted, that, in *Ex parte Morgan*, Mr. Morgan had once been a shareholder, but *Beresford* never was a shareholder. He had never become a partner, for this was

and some calls, but did not execute the deed. The directors declared his shares forfeited, and carried them to the Company's share account, and he submitted to the forfeiture. On the affairs of the Company being, several years afterwards, wound up, under the Joint-stock Companies Winding-up Act, the Master excluded the allottee from the list of "contributories," holding, that he was virtually a party to the deed, so as to enable the directors to forfeit his shares under its provisions; and that the forfeiture relieved him from responsibility in respect of losses accruing before it was declared. The Court, on appeal, affirmed the decision, holding that he had been connected with the Company merely by contract, which might be put an end to by the consent of both parties.

(a) 1 Hall & T. 320; 1 Mac. & G. 225.

an unformed partnership, and the allotment of shares continued after *Beresford's* had been forfeited: *Geddes v. Wallace* (a). The Winding-up Act never intended to create any new liability or alter the law, but merely to facilitate the administration of justice.

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In re  
KOLLMANN'S  
RAILWAY LOCO-  
MOTIVE AND  
CARRIAGE  
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Ex parte  
BERESFORD.  
Argument.

Mr. *Bacon*, in reply, contended, that under the Winding-up Amendment Act it was not necessary that a Company should be completely formed; that Lord *Mansfield's case* (b) decided, that, if a party agreed to take shares, and paid a deposit, he was liable to some extent. He cited *Parbury's case* (c), and *Sharpus's case* (d).

LORD COMMISSIONER ROLFE:—

July 15th.  
Judgment.

Mr. *Beresford* agreed to take five shares of 20*l.* each in this Company, which was established by a deed of the 18th of March, 1845. He paid various instalments on his shares, amounting in all to 40*l.*, part before and part after the date of the deed. He never executed the deed, though often called on so to do. Till he had executed the deed, he certainly was not a member of the Company, though by his contract he might have made himself subject to all or some of its liabilities. There was a clause in the deed authorising the directors (*inter alia*) to declare forfeited the shares of any of the parties named in the schedule who should not execute the deed before the 18th of April, 1845. In fact there was no schedule to the deed; but on the 19th of August, 1845, the directors resolved, that if Mr. *Beresford* did not execute the deed on or before the 25th, his shares should be forfeited. This resolution was communicated to Mr. *Beresford*; and, he having made default, the directors, on the 26th of August, declared his shares forfeited,

(a) 2 Bligh, 270.

(b) 1 Hall & T. 593.

(c) 3 De G. & S. 43.

(d) Id. 49.

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*Judgment.*

and they were carried to the credit of the Company. In this arrangement Mr. *Beresford* and the Company acquiesced; and, under these circumstances, the Master held that he was not a contributory, and Vice-Chancellor *Knight Bruce* held the same, and we think rightly.

The argument before us in support of the motion to discharge the order of the *Vice-Chancellor*, and to put Mr. *Beresford's* name on the list, turned mainly on this: that he had once been a holder of shares, and had never gotten rid of the liabilities arising therefrom; and we were pressed with the well-established doctrine, that, where a joint-stock Company is trading under a deed, their shares can only be forfeited or transferred in the mode pointed out by the deed. But that doctrine is not applicable in a case like this, where the party holding what are inaccurately called shares has never executed the deed so as to be strictly a shareholder. Mr. *Beresford* had a right to become, and perhaps might have been compelled to become, strictly a shareholder; till, however, he had clothed himself with that character, he was merely connected with the Company by contract, and when he, on the one hand, and the directors on the other, agreed to put an end to that contract and to the relations arising out of it, on certain terms, it was competent to them so to do, and all further connexion between them ceased. According to the terms of the arrangement,—not perhaps strictly a forfeiture, though so designated by the parties,—Mr. *Beresford*, on the 26th of August, 1845, ceased to have any claim upon or liability to the Company. This was the view of the case taken by the Master and by his Honor; and this motion must therefore be refused, with costs.

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*In re* THE DIRECT EXETER, PLYMOUTH, AND  
DEVONPORT RAILWAY COMPANY, *Ex parte* *July 4th &*  
ROBERTS. *15th.*

THIS was an application, by way of appeal from a decision of the Vice-Chancellor *Knight Bruce*, that the name of *Edward Hunt Roberts* might be placed on the list of contributories of *The Direct Exeter, Plymouth, and Devonport Railway Company*, which had been ordered to be wound up under the Joint-stock Companies Winding-up Act. In one particular the case bore considerable resemblance to *Ex parte Besley*(a), namely, that *Roberts* had paid 65*l.* to the credit of the Company. That payment was, however, made under protest, and when *Roberts* was threatened with actions by creditors of the Company. The other circumstances of the case are fully stated in the judgment.

Mr. *J. Russell* and Mr. *Roxburgh* for the motion, on behalf of the official manager, relied on *Ex parte Besley*(a). *Roberts's* name had appeared in the list of the provisional committee, without any qualification to shew that he was not liable.

[LORD COMMISSIONER ROLFE.—He said he would become a provisional committee-man when he was indemnified. He never was indemnified. Therefore you must make him out to have been a committee-man from other acts.]

He attended meetings and paid a contribution: *Barker v. Whitworth*(b), *Woolmer v. Toby*(c).

Mr. *T. H. Terrell*, for *Roberts*, cited *Reynell v. Lewis* and *Wyld v. Hopkins*(d).

A. consented that his name should be placed on a provisional committee of a Railway Company, subject to his approval of the plans and course of the line, and so that he should be held free from all liabilities. His name was put on the list, and he attended two meetings of the provisional committee, at the latter of which a managing committee was appointed; but A. left the meeting before the resolution was passed. His name was afterwards withdrawn at his request:—*Held*, that, under these circumstances, and independently of the stipulation in his original consent, he was not liable as a contributory; and that the fact of his having contributed 65*l.* under protest, when threatened with actions by creditors of the Company, did not vary the case.

(a) *Ante*, p. 375.

(c) 4 Railw. Cas. 713.

(b) In the Q. B. *Vide Law*

(d) 15 M. & W. 517.

*Times*, 1849, p. 550.



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Mr. *Roxburgh* replied.

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 THE DIRECT  
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 DEVONPORT  
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 ROBERTS.  
*Judgment.*

LORD COMMISSIONER ROLFE :—

In this case, to which the same principles apply as to the case of *Ex parte Cottle (a)*, application was made to Mr. *Roberts* by a circular from *Thomas Floud*, a solicitor at *Exeter*, pointing out the advantages of the proposed line of railway.

To this letter Mr. *Roberts* replied by a letter of the 22nd of September, 1845, in these words :—

“ Being the owner of a set of mills, and lands in the parish of *Bridford*, near which I presume the proposed railway is intended to come, I beg to inform you, in reply to your note, that you may confidently reckon on my support. In proof of which you may, should you think proper, place my name on the provisional committee.

“ Yours, E. H. ROBERTS.

“ P. S. This must be taken subject to my approval of the plans and course of the line when definitively fixed upon, and so that I shall be held free from all liabilities.”

No answer was sent to this letter, but the name of Mr. *Roberts* was put on the list of the provisional committee. On the 4th of October following, a meeting of the provisional committee was held, at which twenty-one members were present, including *Roberts*, and it was then resolved that another meeting should be held on the 7th, for appointing a managing committee. That meeting was accordingly held, thirty members being present, including *Roberts*. He took no part in the proceedings at the meeting, and left it before any resolution was formally passed or recorded. The only resolution passed at that meeting was, that certain gentlemen who were named should be the committee of management. On the 20th of October,

(a) Ante, p. 382.

*Roberts* desired that his name might be struck out of the provisional committee, and this was accordingly done.

Under these circumstances the Master placed the name of *Mr. Roberts* on the list of contributories; but, on application to Vice-Chancellor *Knight Bruce*, his Honor ordered it to be struck out. The official manager moved to discharge this order of his Honor, and to have the name of *Mr. Roberts* restored to the list; but we think there is no ground whatever for the application. The only circumstance found in this case, and not existing in that which we have just decided (*Ex parte Cottle*) is, that *Mr. Roberts* attended two meetings of the provisional committee. But this makes no difference whatever in principle. The question in every case is, not what meetings has a committee-man attended, but what acts has he authorised to be done?

Attendance at a meeting proves in general that the party so attending is a member of the body assembled: but it proves no more. If indeed any act is done by the meeting, the circumstances may be such as to warrant the presumption that what was done was the act of every person present. Such may be the fair inference under some circumstances: it may be a very unreasonable inference in others. No one present at such a meeting is bound by any resolution to which he does not, expressly or impliedly, assent. Now, here it appears, that, before any resolution was finally come to by the meeting of the 7th of October, *Mr. Roberts* had left the meeting; and so the resolutions passed certainly were not his acts. Indeed, if he had concurred, all that he would have concurred in would have been in appointing the persons named in that behalf to be the committee of management; and, as was pointed out in the judgment in the Exchequer, to which we have already referred (*a*), it by no means necessarily

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(a) *Reynell v. Lewis*, and *Wyld v. Hopkins*, 15 M. & W. 517.

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follows from thence, that the parties appointing the committee of management gave them authority to make contracts. It is not, however, necessary to discuss this; for it is certain, on the evidence before us, that *Roberts* did not concur in the resolution by which the committee of management was appointed. We should for these reasons have been of opinion that Mr. *Roberts* was not a contributory, even independently of the fact, that, in joining the committee, he expressly stipulated that he was to incur no liability.

It was urged, that this stipulation was not known to the other members; and if, without such a stipulation, he would, by merely joining the committee, have become liable to the expenses incurred, the argument arising from the non-communication of that fact to the other members might be entitled to weight. But it is certain that Mr. *Roberts*, when he joined the committee, supposed he had guarded himself against all risks; and this tends strongly to shew the propriety of the view taken by the courts of law of the legal position of committee-men. To hold that the mere fact of being a committee-man makes a man responsible for others, would in effect be to say, that a qualified consent to an application necessarily amounts to, or, at all events, subjects the party to the consequences of an absolute one.

It is hardly necessary to say, that in this case the payment of 65*l.* by Mr. *Roberts* does not vary the case. That payment was evidently made merely *causâ pacis*, and under protest.

It was pressed upon us, that the judgment of his Honor in this case was opposed to that of Lord *Cottenham* in *Besley's* case. (a) But on referring to the note of the judgment there, we find that Lord *Cottenham* expressly

(a) *Ante*, p. 375.

and studiously founds his opinion on the specialties of the case, and so cannot be taken to have decided the general question.

We are of opinion, on the grounds we have already stated, that the motion in this case must be dismissed, with costs.

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*Judgment.*

*In re* THE ST. GEORGE STEAM-PACKET COM-  
PANY, *Ex parte* HENNESSY.

July 4th, 11th,  
& 15th.

THE question raised upon this application was, whether some shares in the *St. George Steam Packet Company*, the affairs whereof were being wound up under the Joint-stock Companies Winding-up Act, had been effectually transferred, so as to exonerate the transferor from any future liability in respect of those shares.

The deed of settlement of a Joint-stock Company required every transfer of shares to be registered, and the form of the transfer was adapted for execution both by transferor and by transferee. A shareholder sold his shares, and executed a transfer, which, however, was never executed by the transferee, the purchase having been made by a father for his son, but the son declining to accept the shares. The transfer was duly registered, and the Company addressed notices and circulars to the son at the residence of the father:—*Held*, that the seller

The facts of the case are stated in the judgment; and it is only necessary to add, that, after the transfer by *Michael Hennessy*, notices of calls and circulars were sent to him by the Company, in respect of those shares only which he continued to hold in the Company; and that notices in respect of the shares which he had transferred to *Needham*, and circulars were sent by the Company to *Needham*, at the residence of his father, who alleged in his affidavit, that he received them, but destroyed them without communicating them to his son.

The deed of settlement by which the Company was constituted contained the following provisions:—

“Clause 17. That it shall be lawful for the proprietors

had not effectually transferred his shares so as to have got rid of his liability as a shareholder, and that he was properly placed upon the list of contributories, upon the affairs of the Company being wound up under the Winding-up Act.

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in the said Company, or their legal representatives, whether by marriage, or as executors or administrators or legatees, to sell and transfer to any person or persons whomsoever all or any of the shares of such proprietor in the property and funds of the Company; and whenever such sale and transfer shall be made, a return or account thereof shall be made to the clerk or the agent for the time being of the said Company, and shall from time to time be registered in the books of the said Company, on payment of the fee of 2s. 6d. on each share so transferred; and the person or persons to whom such transfer shall be made shall be and stand, in all respects and to all intents and purposes, in the place and stead of the person or persons making such transfer, and shall be liable to be sued, in an action of covenant or otherwise, for any breach of the rules and regulations of the said Company, as fully and effectually, to all intents and purposes, as if such person or persons to whom such transfer or transfers shall have been made had been a proprietor or proprietors at the date of these presents; and the form of transfer of such share or shares may be in the following words or to the like effect, varying the names and descriptions of the contracting parties as the case may require:—

‘I, —, of —, in consideration of — paid to me by —, of —, in the county of —, do hereby bargain, sell, assign, and transfer to the said — — shares of £— each, numbered as per margin, of and in the capital stock of the Company called the *St. George Steam Packet Company*, to hold unto the said —, his heirs, executors, administrators and assigns, subject to the same conditions as I held the same immediately before the execution hereof. And I, the said —, do hereby agree to accept and take the said shares subject to the same conditions. As witness our hands this — day of —, 184 .

‘Witness.

‘(Signed).’ ”

" Clause 18. And every deed or transfer (being executed by the seller or sellers and the purchaser or purchasers of such share or shares) shall be delivered to and kept by the clerk of the said Company, who shall enter in a proper book or books to be kept for that purpose a memorial of such transfer and sale, and indorse the entry of such memorial on the said deed of sale or transfer, for which no more than 1s. is to be paid; and on request a certificate of each share shall be delivered by him to the purchaser or purchasers, for his, her, or their security, and for which certificate no more than 1s. 6d. shall be paid; and until such memorial shall have been made and entered as above directed, such purchaser or purchasers shall have no part or share in the profits of the said Company, nor any interest for such share or shares paid to him, her, or them, nor any vote or votes in respect thereof as a proprietor or proprietors of the Company."

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" Clause 21. That any person who, being a purchaser of any shares in the capital of the Company, shall take a transfer or assignment of such shares, and shall not previously to such purchase have executed or otherwise acceded to these presents, or shall not, at the time of the said shares vesting in him in such capacity by the means aforesaid, be a recognised proprietor in the Company in respect of any other shares in the capital, shall, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered as a proprietor in the Company from the time of the shares being so purchased by or becoming so vested in him as aforesaid, but as to all profits, rights, privileges, benefits, and advantages to arise from the said shares, no such person shall be considered a proprietor in respect of the same until he shall have executed or otherwise have acceded to these presents."

" Clause 51. That the person by whom or in whose

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name the shares shall be held or stand, shall, to all intents and purposes whatsoever, be deemed at law and in equity the absolute, sole, and beneficial owner and holder of such shares, and shall, as such, be the only person known to or recognised by the said Company in all votes, transfers, notices, payments, receipts, and other matters relative to the same shares, and the Company shall in no case be bound to notice or affected with express notice of any trust."

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*Argument.*

Mr. *Malins* and Mr. *Surrage*, in support of the application, contended, that the shares had been duly transferred by *Michael Hennessy*, and the transfer having been duly registered by the Company, his liability was at an end. There was no clause which expressly required the transfer to be executed by the transferee, and the acceptance of the transfer might be by other acts of the party. The provisions in the deed were for the benefit and protection of the Company, and might be waived by them. The 21st clause contained the expression "or otherwise acceded to" the deed.

[LORD COMMISSIONER ROLFE.—If the deed points out a particular mode of transfer, must not that mode be adopted? In a case which was lately before the Court of Exchequer, the liability of the shareholder was held to continue where he had executed a transfer, which had been duly entered in the Company's books, but it had not been executed by the transferee.]

The directors were merely the organ for making the transfer. In *Ex parte Morgan (a)*, the directors had no authority to purchase the shares. An assignee of a lease

(a) 1 Hall & T. 320; 1 Mac. & G. 225.

was made to covenant to pay the rent and perform the covenants, but he seldom signed the deed, yet he would be held to take the property subject to those terms: *Taylor v. Hughes* (a). *Hennessy* could not have claimed any share in the profits of the Company, in respect of those shares, nor could any creditor of the Company have sustained an action at law against him: *Burnes v. Pennell* (b), *Foster v. The Governor and Company of the Bank of England* (c).

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Mr. Bacon and Mr. J. V. Prior, contra, insisted, that *Hennessy* could only get rid of his liability to the Company by procuring some other party to stand in his place; that this provision was for the benefit of the shareholders; and that the directors had no power to waive so important a part of the constitution of the Company.

Mr. Malins replied.

LORD COMMISSIONER ROLFE:—

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In this case the Company had been duly constituted by deed, and it was in full operation. *Michael Hennessy* was, in and prior to the year 1841, a shareholder holding several shares, i. e. one of 100*l.* and several of 25*l.*; and the only question is, whether, on the 22nd of October, 1841, he so sold and transferred sixteen 25*l.* shares, as to have gotten rid of all liability to the Company in respect of them. *Michael Hennessy* died in 1846, and *J. C. Hennessy* is his personal representative. The Master considered that *Michael Hennessy* had, in 1841, divested himself of all interest in these sixteen shares, and refused to place his executor on the list of contributories; but, on the application of the official manager, Vice-Chancellor *Knight Bruce* came to

(a) 2 J. & L. 24. (b) 2 H. L. Ca. 497. (c) 15 L. J., Q. B., 212.



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a different conclusion, and referred it back to the Master to review his report, in order that he might place on the list the name of *J. C. Hennessy* as executor of *Michael*. Mr. *Hennessy* moved by way of appeal to discharge this order, on the ground above stated, namely, that *Michael Hennessy* had ceased to be the holder of these shares in October, 1841. A great deal of evidence was taken before the Master, but there appears in the result to be no doubt about the facts; and the only question is as to the legal consequence of these facts when considered with reference to the clause in the Company's deed relative to transfers. The clause directing the mode of transfer is clause 17. [His Lordship read it.]

The facts are these. In October, 1841, *Thomas Richard Needham*, wishing to benefit his son *Richard Needham*, who was an engineer, and whose business made it necessary for him often to cross to and from *England* and *Ireland*, purchased for his son, through a broker at *Cork*, the sixteen shares in question from *Michael Hennessy*, the holder of shares to a certain amount having the privilege of passing to and fro in the Company's vessels without charge. The purchase-money, 190*l.*, was then paid to *Michael Hennessy* by the agent of *Thomas Richard Needham*, but the purchase was made in the name of the son. *Michael Hennessy* thereupon executed, at the office of the Company at *Cork*, a transfer to the son, *i. e.* *Richard Needham*, of the sixteen shares; but this transfer was never executed or acceded to by *Richard Needham*. On the contrary, when he was soon afterwards informed by *Thomas Richard Needham*, his father, of what had been done, he wholly declined to have anything to do with the shares, believing, as he says, that the Company was insolvent. Under these circumstances it is plain that nothing had been done by *Richard Needham* which could make him liable as a contributory.

It was, however, argued, that though *Richard Needham*, the proposed transferee, might not be liable, still the Company had precluded itself from treating *Michael Hennessy* as still being one of its members. But this is not so. *Michael Hennessy*, in order to relieve himself from liability, was bound to procure a transferee who should put himself in his place. The only transfer ever attempted to be made was to *Richard Needham* the son, who, it is admitted, never in any manner accepted it. The mode of transfer required by the deed of settlement is, as we have already seen, a transfer to be executed by the transferee in order to signify his consent, and so to make himself liable as a purchaser. Till that has been done, the seller continues liable to the Company as one of its members.

It was said, that there was laches in the Company in not getting the transferee to signify his acceptance or rejection. But this is not so. What could the Company do more than they did? There was the transfer executed by the seller, waiting to be executed by the purchaser, if he had chosen to present himself; but he never did so.

It was argued that this was really a purchase by the father; and some facts were relied on in the evidence tending to shew that the Company considered and treated the father as the purchaser. This, we think, is not at all made out; but, even if it were, it would not vary the case; for it is abundantly clear that the transfer in the books was to the son, and not to the father; and the evidence clearly shews that the father never accepted, or intended to accept, any of the shares in question. Whether, as between *Hennessy* and the father, the father might be compelled to accept the shares, is a question not now before us. Vice-Chancellor *Knight Bruce* was of opinion that *Michael Hen-*

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*Judgment.*

nessy, as a shareholder, was liable up to the 21st of October, 1841; that, never having made a valid transfer, he continued liable after that date up to his death, and so that the name of *J. C. Hennessy*, his executor, was properly placed on the list of contributories. In that opinion we entirely concur; and this motion must therefore be refused, with costs.

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June 24th.

## ROBISON v. MANUELLE.

An agreement was come to between the Plaintiff and the first-named Defendant, by which it was agreed that the bill should be dismissed, and that the Defendant should pay all costs, which were to be taxed, if necessary; and the Plaintiff agreed to move to dismiss, and, in default of her doing so, the Defendant was authorised to instruct Counsel for that purpose, on her behalf. A sum of money was paid in respect of the Plaintiff's costs, the solicitors undertaking to return a part, if, upon taxation, they should be found to have been

IN this cause a motion had been made before the *Vice-Chancellor of England*, on behalf of the Defendants, that the Plaintiff and her solicitors might be ordered, within a week after service of the order to be made on that motion, to leave with the Registrar an original order made in this cause on the 9th of July, 1847, and delivered out by the Registrar to the Defendants or their solicitor, in order that it might be entered with the proper officer of the Court; and that the order, when so produced, might be entered accordingly; and that the Plaintiff and her solicitors might be ordered to pay the costs of the application and of the order to be made thereon. Notice of the motion was served on the Plaintiff and her solicitors. The *Vice-Chancellor of England* refused the motion, with costs, and it was now renewed by way of appeal before the *Lords Commissioners*; and the Defendants also asked that the order of the *Vice-Chancellor* might be discharged.

The order of the 9th of July, 1847, which was referred to in the notice of motion, was made in pursuance of an

overpaid; and an order was made on a motion by the Plaintiff, for the dismissal of the bill, but from the fault of the Plaintiff, the Defendant could not get it passed and entered. Upon motion by the Defendant three years afterwards, an order was made as against the Plaintiff and her solicitors, to leave with the Registrar the original order and the Counsel's brief on the motion.

agreement which had been entered into for the compromise of the suit. The agreement was dated the 26th of June, 1847, and it was thereby agreed that the bill should, with all convenient speed, be dismissed as against all the Defendants, on payment by the first-named Defendant to the Plaintiff of a fixed sum, and also of the costs, charges, and expenses of and incident to the suit, up to and including such dismissal; and the Defendant *Manuelle* undertook to pay the costs of the other Defendants; and the Plaintiff agreed to cause Counsel to be instructed on her behalf to move that the bill should stand dismissed; and the agreement authorised *Manuelle*, if necessary, to instruct Counsel on the Plaintiff's behalf to make such an application.

1850.  
 ROBISON  
 v.  
 MANUELLE.  
 Statement.

The consideration mentioned in the agreement was duly paid by the Defendant *Manuelle* to the Plaintiff before the execution of it; and a sum of 70*l.* was paid to the Plaintiff's solicitors in respect of costs, on an undertaking that they would return the difference, if, upon taxation, the amount of the costs should be less than 70*l.*

On the 9th of July, 1847, an order was made by consent, on the motion of the Plaintiff, referring it to the Master to tax the costs of the Plaintiff and of the Defendants, except *Manuelle*, and that they should be paid by *Manuelle*, and that, upon such payment, the bill should be dismissed. The minutes were drawn up, but were not settled until March, 1848. Several applications had since been made to the solicitors of the Plaintiff to draw up and pass the order, but without effect. At length they stated, that if the Defendants' solicitor would let them have the order and the Defendants' brief, they would get the order passed; and the Defendants' minutes of the order, and the Defendants' brief, were delivered up to them.

The sum of 70*l.*, paid to the Plaintiff's solicitors, was

1850.  
 ROBINSON  
 v.  
 MANUELLE.  
 Argument.

stated to exceed the amount of the costs, charges, and expenses payable on the terms of the deed.

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Mr. Rolt and Mr. Younge supported the application.

Mr. Bacon and Mr. Torriano, contra.

This is an attempt to enforce the specific performance of an agreement, by means of an order obtained on motion. The Court has no jurisdiction to interfere in such a case by such a process: *Forsyth v. Manton* (a). In *Gilbert v. Cooper* (b) the Court refused upon motion to interfere in enforcing an agreement, and the motion in that case was in the matter of the cause, and in the matter of the solicitor, while this motion is made in the cause only. This motion is also made by all the Defendants, to enforce a compromise which is entered into with one of them. The Plaintiff has done all which she engaged to do. She instructed Counsel to obtain an order, and an order was pronounced. The only practical effect of the motion would be to obtain the taxation of a solicitor's bill three years after it had been paid, and for this purpose the motion was against the Plaintiff and her solicitors. The object of it ought not to be encouraged, and the course which was pursued was irregular.

The *Lords Commissioners* delivered their judgment without calling for a reply.

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*Judgment.*

LORD COMMISSIONER LANGDALE said, that the Defendant had done all which could be possibly done by him. He was quite surprised that it should be represented that the payment of 70*l.* to the solicitors was a payment of the bill

(a) 5 Madd. 78.

(b) 17 L. J., (N. S.), Ch., 265.

of costs of the suit. The real amount was left uncertain. The words used in the agreement, "costs, charges, and expenses," would include all which the Plaintiff had a right to claim. These words were not useless, but would carry the claim beyond the costs simply. There was a compromise of the suit to be carried into effect by means of an order: that order was applied for to the Court and was pronounced by the Court. What, then, was the duty of the parties? The Plaintiff was either to procure a dismissal or enable the Defendants to do so. It was not enough to procure the order by which alone the dismissal could be effected; but the order must have been perfected by all the forms and precautions which were adopted in the offices of the Court. The motion ought to have been granted, with costs; and the order as to costs should be against the solicitors as well as the client.

LORD COMMISSIONER ROLFE concurred with LORD LANGDALE, and added, that although the Plaintiff had moved to dismiss the bill, the Defendant had not got all which he stipulated for, inasmuch as the bill was not out of Court; and that, as to the other point, viz. that the taxation of a bill of costs would be obtained several years after it had been paid, that was an accident which would not influence the decision of the Court.

1850.  
ROBINSON  
v.  
MANUELLE.  
—  
*Judgment.*

1850.

June 25th.

JONES v. LEWIS.

Where the purchase-money for real estate taken by a Corporation is directed to be re-invested in real estate, and all the reasonable costs attending such purchase are to be paid by the Corporation, there is no limit to the number of purchases or to the costs which are to be allowed, except there is an unreasonable exercise of the direction to invest, so as to occasion vexatious and unnecessary expense.

Where a sum of 141,660*l.* had been paid for the purchase of real estate by a Corporation, the expenses of a third and fourth reinvestment were thrown upon the Corporation.

*Statement.*

*SKERRIES LIGHTHOUSE* was purchased in 1837, by the Corporation of the *Trinity House*; and in one-third part of the purchase-money, namely, 141,660*l.* 10*s.*, the Plaintiff *Morgan Jones*, an infant, was interested as tenant for life. That amount had been invested in Three per Cent. Consols, and part of it had already been applied in completing two purchases of land, the purchase-money being, on the first purchase, 96,000*l.*, and on the second, 12,000*l.* The expense of both these purchases was paid by the *Trinity House*.

In June, 1849, a third purchase was made, 4000*l.* only being the amount of the purchase-money. The Vice-Chancellor *Knight Bruce* refused to order the *Trinity House* to pay the costs of the purchase, and this was the first order, which was now appealed from.

The amount of stock which then remained in court was 28,923*l.* 10*s.* 1*d.* A fourth purchase had since been made, when a further sum of 15,000*l.* had been laid out in the purchase of land which adjoined some of the land already purchased, and the Master had approved of the title. The Vice-Chancellor *Knight Bruce* again declined to make an order for the payment of the costs of that purchase, by the *Trinity House*.

The Plaintiff now appealed from both those orders, so far as they related to the question of costs.

The question turned on the 28th sect. of the Act 6 & 7 Will. IV, c. 79, which is as follows:—"That where, by reason of any disability or incapacity of the person entitled to any such lighthouse, the purchase-money shall be required to be paid into the *Bank of England*, and be sub-

ject to the orders and directions of the Court of Exchequer, under the provisions herein contained, the said Court may order all the reasonable costs, charges, and expenses attending such purchase, or which may be incurred in consequence thereof, and also of the investment of the purchase-money in real or Government securities, and likewise the re-investment of such purchase-money, or the Government and real securities purchased therewith, in the purchase of houses, buildings, lands, tenements, and hereditaments, as hereinbefore mentioned, together with the costs, charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, and of the payment of the dividends and interest of the said Government or real securities, and of the payment of the principal of the said purchase-money and of the Government or real securities purchased therewith, out of court, to be paid by the said Master, Wardens, and Assistants, and the said Master, Wardens, and Assistants shall from time to time pay such sums of money for such purposes as the said Court shall direct, out of the monies applicable to the purposes of this Act."

1850.  
 }  
 JONES  
 v.  
 LEWIS.  
 —  
*Statement.*

Mr. Bacon and Mr. Pitman appeared for the Plaintiff; and *Argument.*

Mr. Wigram for the Trinity House.

*In re The Merchant Tailors' Company (a), and Ex parte Bouverie (b),* were cited.

LORD COMMISSIONER LANGDALE:—

There can be no doubt that the Petitioner is entitled to such costs as are reasonably and properly incurred. These *Judgment.*

(a) 10 Beav. 485.

(b) 4 Rail. Cas. 229.



1850.  
JONES  
v.  
LEWIS.  

---

Judgment.

Acts of Parliament are no doubt subject to a great deal of consideration, and the present Act contains clauses very like those which have been inserted in many other Acts upon which questions of this kind have very frequently arisen. I believe that the Court has in almost, if not in every case, considered that it is to have regard to the imperial powers which are mentioned, and which are exercised by taking from a man the property which he had, and which he was unwilling to part with,—taking it from him by imperial power, and converting it into money,—and in cases where there were limitations of property, directing that the money which was produced should be re-invested. That is a case of this sort. I do not find that there is any distinction to be drawn between one species of landed property and another species of landed property. In this case, he has that which is a perfect and good security, satisfactory to the owner of the property, taken from him by superior power, converted into money, and which is to be re-converted from money into land again; and in consequence of that state of things, there is a direction given, that the reasonable expenses which are to be incurred in the change shall be paid to him.

Now it is not to be denied, but that a proceeding of that kind may be taken advantage of in such a way as to occasion vexatious and unnecessary expense to the party on whom the burthen is thrown; and in such a case as that, I have never had the least doubt, that, if it were made out, the Court would take care that the party attempting such a scheme should not be able to receive the profit of it, and would direct a restriction to be put upon the right which he has under the Act of Parliament,—a right to be exercised and put in force by this Court. Therefore, I say, make out a case of vexation, make out a case in which the party has improperly used the power which the Act of Parliament gave him, for the purpose of throwing ex-

penses unnecessarily on the other party, and he shall be charged. What is the nature of the case? Here is not less than 141,000*l.*, which is the money obtained as a compensation for the real property,—a lighthouse (but no matter what it is),—141,000*l.* is the money which is produced to the party for that which was his own, and which he would not have parted with, unless he had been compelled to part with it. That may be assumed. Well, then, the 141,000*l.* being paid into the Court of Exchequer (now brought into the Court of Chancery), because of the incapacity of the person to whom it belonged to deal with it, the Act of Parliament provides, that “the Court may order all the reasonable costs, charges, and expenses attending such purchase, or which may be incurred in consequence thereof, and also of the investment of the purchase-money in real or Government securities, and likewise the re-investment of such purchase-money, or the Government and real securities purchased therewith, in the purchase of houses, buildings, lands, tenements, and hereditaments, as hereinbefore mentioned, together with the costs, charges, and expenses of obtaining the proper orders, and of the other proceedings for such purposes, and of the payment of the dividends and interest of the said Government or real securities, and of the payment of the principal of the said purchase-money, and of the Government or real securities purchased therewith, out of court, to be paid by the said Master, Wardens, and Assistants” of the *Trinity House*. They are to be the reasonable costs. The reasonable costs would no doubt be properly taxed and ascertained.

The question really raised here is, are the costs to be called unreasonable because, in re-investing no less a sum than 141,000*l.*, there have been these particular sums of money invested separately? The first was 96,000*l.*, the second 12,000*l.*, the third was 4000*l.*, and the fourth was 15,000*l.* It does not exhaust by any means the whole sum. I cannot find there is anything said to shew that

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JONES

v.

LEWIS.

*Judgment.*

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JONES

v.  
LEWIS.—  
*Judgment.*

this was done for any improper purpose, unreasonably to throw costs on the *Trinity House*, unreasonably to make several purchases in order that the *Trinity House* might have to pay the expenses of those investments. That is not alleged, but it is alleged, "You ought to have done all this in two purchases, and if you are entitled to have your reasonable costs, charges, and expenses, you ought to have made the whole investment of the 141,000*l.* two transactions, and no more." I confess I cannot see that that is, or ought to be considered as a general rule to be acted on; I cannot think, because this is a lighthouse,—a particular species of property,—that a man is to be reduced to that necessity, and is to be told, "Either you are to invest this in two transactions, or you are not to have the costs, charges, and expenses, which the Act of Parliament gives you." A man might spend his whole life before he could find proper purchases suitable to his convenience. Make out that he is seeking for purchases for decoration or his own amusement, and had found them in little bits at a small rate each one, and that he is attempting to throw the expense of doing that on the *Trinity House* unnecessarily; make out such a case, and I think there ought to be interference against him. No such case has been made out, and therefore I think these costs ought to be allowed.

LORD COMMISSIONER ROLFE:—

I think this case falls within the principle laid down by Lord *Langdale* in the case cited from 10 *Beavan* by Mr. *Bacon*. It is true, as it is stated, that in that Act of Parliament the direction was, that *all* costs were to be paid, and that it is not so here: it is here "all the reasonable costs;" but I think that is a distinction without a difference, because "all costs" would, in the language of the Legislature, imply all reasonable costs. It would be absurd to suppose they intended that unreasonable costs were to be paid, because they have not inserted the word "reasonable."

1850.  
 JONES  
 v.  
 LEWIN.  
 —  
*Judgment.*

Then Mr. *Wigram* contended that this is a case within the discretion of the Judge, and not properly the subject of appeal; just in the same manner as the Court will not hear an appeal where there has been a decree giving costs, or like the case of a bill taxed, and where, if it has been taxed on a correct principle, the Court would not look into the items. I do not think his analogy bears him out. If the Act of Parliament had said, the costs of so many purchases shall be paid as the Judge shall think reasonable, and he had said, I think five are reasonable, or six are reasonable, it might be that the Court would say,—we cannot be discussing whether seven or eight will be reasonable, when the Judge below has said six or seven would be reasonable. That is not at all this case. I think the learned *Vice-Chancellor* has proceeded on an erroneous principle. I can see no limit, I confess, to it, except an unreasonable exercise of discretion on the part of those who are purchasing; but it is not suggested that there was anything of that sort here; on the contrary, his Honor is reported to have said, he supposed the parties acted *bond fide*, in order to do their duty to the parties. If that is so, and, as Lord *Langdale* remarks, the imperial power has taken from the individual something which he had before, and has substituted a sum of money to be re-invested, I think these parties must pay all the costs of so reasonably re-investing, otherwise they do not put the party in the same position that he was in before the property was taken.

LORD COMMISSIONER LANGDALE:—

No doubt suspicions have been entertained in some cases, that an advantage was improperly taken of this clause; and in consequence, a clause has been introduced into the recent Act of Parliament, limiting the number of purchases (a). The mere existence of that clause shews we could not get on without it.

(a) Lands Clauses Consolidation Act, 1845, s. 80.

1850.

July 5th, 9th,  
10th, 15th.

Where the deed of settlement of a Company authorises a general meeting of shareholders to remove a director for any reasonable cause, he may be removed for any cause which in the opinion of the shareholders duly assembled shall be deemed reasonable, without its being incumbent upon them to prove the reasonableness of the cause in any court of justice.

A meeting was called by advertisement, stating that the object of it was to remove directors, but not stating any alleged grounds for their removal; and also mentioning several other objects of the meeting:—  
*Held*, that it was regularly convened, and was competent to remove the directors.

### INDERWICK v. SNELL.

THIS was an application to discharge an order of *Vice-Chancellor Wigram*.

The bill was filed by *Inderwick & Cowan*, on behalf of themselves and all other proprietors of shares in the *London Conveyance Company*, (except the Defendants,) against the present directors of the Company and *T. H. Johnson*; and the object of it was in effect to obtain the decision of the Court, whether the Plaintiffs and *Johnson* had been properly removed by a public meeting of the shareholders from being directors of the Company.

The Company was established for the purpose of running omnibuses; and the affairs of it were regulated by a deed of settlement, which contained the following provisions:—

8. "That an extraordinary general meeting may be called at any time by the board of directors, in manner hereinafter mentioned."

9. "That any ten or more of the proprietors, holding in the aggregate not less than 1000 shares, &c., may at any time, by writing under their hands, require the board of directors to call an extraordinary general meeting for any purpose relating to the Company."

10. "That in every such requisition the object for which the extraordinary general meeting is required to be called must be fully expressed, and the day, hour, and place for holding the same must be specified, otherwise it shall not be incumbent on the board of directors to take notice of such requisition.

1850.

INDRAWICK

v.

SNELL.

*Statement.*

11. "That if, after any such requisition to the board of directors for calling an extraordinary general meeting shall have been left at the office of the Company, the board of directors shall neglect or refuse to call the same within the time and in the manner hereinafter mentioned, then and in such case it shall be lawful for the proprietors who shall have signed the neglected or refused requisition, to call the extraordinary general meeting on some other day, for the purposes mentioned in such requisition, either by advertising the same in any two or more of the *London* daily newspapers, with their names subjoined, or by sending to each proprietor a circular letter, to be inserted or sent at least seven days and not more than fourteen days before the time fixed for holding such extraordinary general meeting, and to specify the day and hour of the meeting, and the place at which it is to be held; but it shall not be incumbent therein to specify the object of such meeting, unless it shall be called for dissolving the Company."

25. "That the general meetings shall have full power to superintend, regulate, and control all the affairs of the Company, except when otherwise provided by these presents."

27. "That an extraordinary general meeting, specially called for the purpose, may remove from his office any director or auditor for negligence, misconduct in office, or *any other reasonable cause.*"

40. "That it shall be lawful for the board of directors at any time to call the half-yearly general meeting, either by advertising the same in any two or more of the *London* daily newspapers or by sending to each proprietor a circular letter, signed by the secretary of the Company; such advertisement or circular letter to be inserted or sent at

1850.  
 INDERWICK  
 v.  
 SNELL.  
 Statement.

least seven days and not more than fourteen days before the time fixed for holding the same, and to specify the day and hour and place of the meeting; but it shall not be incumbent to specify therein the object of such meeting, unless it be called for the object of dissolving the Company."

41. "That when and so often as a requisition for calling an extraordinary general meeting shall have been left at the office of the Company by ten or more proprietors, holding in the aggregate not less than 1000 shares, the board of directors shall call an extraordinary general meeting, either by advertising the same in any two or more of the *London* daily newspapers, or by sending to each proprietor a circular letter, signed by the secretary of the Company; such advertisement or circular letter to be inserted or sent at least seven days before the time named in the requisition for holding the same, and to specify the day and hour and place of the meeting; but it shall not be incumbent to specify therein the object of such meeting, unless it shall be called for the purpose of dissolving the Company."

104. "That the directors of the Company shall never exceed seven nor be less than five, and the auditors of the Company shall never exceed two."

In 1849, the following requisition was left at the office of the Company:—

"To the Directors of the London Conveyance Company.

"We, the undersigned, being twenty of the shareholders in the London Conveyance Company, holding together 1000 shares, hereby request you to call an extraordinary general meeting of the shareholders in the said Company,

to be held on Thursday, the 15th of November next, at twelve for one o'clock in the afternoon, at the *George and Vulture Tavern, George Yard, Lombard-street*, for the following purposes, that is to say: first, to appoint a committee of shareholders to investigate, with the assistance of an accountant, the books and accounts of the Company, and inspect the stock and property of the Company; secondly, to direct that such committee be furnished with a copy of the deed of settlement of the Company; thirdly, to remove Messrs. *Inderwick, Cowan, and Johnson* from the office of directors, and to refer it to the foregoing committee to nominate and recommend fit and proper persons to be directors in their room, the names of such persons to be submitted for election at a future meeting of shareholders duly convened for that purpose."

1850.  
 Inderwick  
 v.  
 Snell.  
 Statement.

This document was dated the 31st of October, 1849, and was signed by twenty proprietors, including three of the directors. The directors refused to call a meeting in pursuance of the requisition, on the ground that the objects of it were not warranted by the deed of settlement; and in consequence of that refusal, the requisitionists, acting on the 11th clause of the deed, called an extraordinary general meeting, by advertisement, for the 20th of December,—the advertisement following the terms of the requisition. The meeting accordingly took place on the 20th, and on the chair being taken, *Inderwick* read a protest, signed by himself, *Cowan*, and *Johnson*, against the legality of the meeting, and declined to take part in it, and immediately thereupon he left the room. Certain charges of misconduct were then brought forward by *Snell*, a director, against *Inderwick, Cowan, and Johnson*, and the meeting passed a unanimous resolution, removing these three gentlemen from the office of directors, for misconduct, negligence, and other reasonable cause; and they



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INDERWICK  
v.  
SNELL.  
—  
Statement.

were from that time excluded by the other directors from all interference with the affairs of the Company.

On the 3rd of January, 1850, another extraordinary general meeting was held, to fill up the vacancies in the direction occasioned by the removal of *Inderwick*, *Cowan*, and *Johnson*; and at that meeting *H. Harmes* and *Tanner* were elected directors. *Inderwick* and *Cowan* attended it merely to protest against the legality of the proceedings, and immediately thereupon retired. On the 21st of January the half-yearly general meeting was held, and two other of the Defendants, *Donne* and *Seabourne*, were then elected directors. *Inderwick* and *Cowan* then instituted this suit, charging that the election of the new directors was void, and that all acts done by them in that character were void; and also charging that, under the 27th clause of the deed of settlement, the requisition to call a meeting for the removal of a director should clearly express the cause of removal, in order to give such director an opportunity of defending himself, which he could not do without knowing the nature of the charges to be brought against him; and also insisting that the charges made at the meeting of the 20th of December, 1849, were unsupported by any evidence.

The bill prayed, that, until the hearing of the cause, or until the Plaintiffs and the Defendant *Johnson* respectively should be duly and lawfully removed from the office of directors, or should retire, or should otherwise cease to be directors, the Defendants *Snell*, *Hamilton*, and *Wheatley* might be restrained by injunction from doing, authorising, or permitting any act as directors or a director of the Company, except in pursuance of orders of the board of directors, to be made at meetings of the board which the Plaintiffs and *Johnson* should have had due notice to attend,

and that in the meantime, and until the Plaintiffs and *Johnson* should be duly and lawfully removed, and also until the Defendants *Harmes*, *Tanner*, *Donne*, and *Seabourne* respectively should be duly elected directors, the said four last-named Defendants, and every of them and their respective officers, &c. might be restrained from doing, authorising, or permitting any act as directors or a director of the Company.

1850.  
 INDERWICK  
 v.  
 SNELL.  
 Statement.

A motion was made for an injunction before the Vice-Chancellor *Wigram*, who granted an injunction according to the terms of the prayer of the bill.

The Defendants, except *Johnson*, *Harmes*, and *Tanner*, moved to discharge the order of the Vice-Chancellor granting the injunction.

The *Solicitor-General* and Mr. *Glasse*, in support of the motion. Argument.

First, The construction of the bill is incorrect. The Plaintiffs are persons whose conduct was made the subject of complaint; their interests are therefore opposed to those of the other shareholders who complain of them. In *Mozley v. Alston*(a) the *Lord Chancellor* said—"Where the grievance complained of is common to a body of persons too numerous to be all made parties, the Court has permitted one or more of them to sue on behalf of all, subject, however, to this restriction: that the relief which is prayed must be one in which the parties whom the Plaintiff professes to represent have all of them an interest identical with his own; for if what is asked may by possibility be injurious to any of them, those parties

(a) 1 Ph. 798.

1850.  
 UNDERWICK  
 v.  
 SNELL.  
 —  
 Argument.

must be made Defendants." The majority of the shareholders was opposed to the Plaintiffs, and the Court will discourage such an attempt as this: *Lord v. The Copper Miners' Company*(a).

Secondly, The meeting was the sole judge of the propriety of removing the directors. It was to decide which of the copartners in the undertaking should have the active management of its affairs; and if the proprietors suspected or felt dissatisfied with a director, they might remove him upon such evidence as they thought sufficient. If a contrary principle were established, the Court of Chancery might become a court of appeal from every meeting of every Company: *The Queen v. The Governors of the Dartington School*(b). In *The Exeter and Crediton Railway Company v. Buller*(c) the Vice-Chancellor directed a second meeting to be held. [They also cited *Foss v. Harbottle*(d) and *Ridgway v. The Hungerford Market Company*(e).]

Mr. Bethell, Mr. W. M. James, and the Hon. F. Byron, appeared for *Harmes and Tanner*.

Mr. Wood and Mr. Bird, for the Plaintiffs.

First, All the shareholders have an equal interest in providing that the trusts of their deed of settlement are properly carried out. In *Colman v. The Eastern Counties Railway Company*(g), where the Plaintiff moved to restrain the Railway Company from employing any of their funds in steam packets, it appeared that several of the shareholders had taken shares in the Steam Packet Company; yet the Court held, that the Plaintiff could sue on their behalf:

(a) 1 Hall & T. 99; 2 Ph. 740.

(b) 6 Q. B. Rep. 716.

(c) 16 L. J., Chanc., 449.

(d) 2 Hare, 493.

(e) 3 A. & E. 171.

(g) 10 Beav. 1.

*Bagshaw v. The Eastern Union Railway Company*(a), *Natusch v. Irving*(b).

1850.  
 {  
 INDERWICK  
 v.  
 SNELL.  
 —  
 Argument.

Secondly, There was no just cause shewn for the removal of the directors. In *Re Fremington School*(c) the Court held, that the Master could not be removed at the caprice of the governors.

[LORD COMMISSIONER ROLFE.—There the master might be removed, if there *was* just cause, not if the visitors *thought* there was just cause.]

In this case no fact was established against the directors—no correct information was given to the meeting—and no evidence was brought forward. Can the meeting say, “No cause being shewn—no reasonable ground appearing—we resolve that the directors be dismissed?”

Thirdly, The 27th clause of the deed required the meeting to be called specially for the purpose of removing the directors. The meeting in this case was called for a variety of purposes, and stated no cause for their removal: it was therefore irregular.

Fourthly, The 104th clause stipulated that the number of directors should never be less than five. The resolution removed three out of six, and it was therefore void.

Mr. *Toller* appeared for *Johnson*.

The *Lords Commissioners*, without hearing a reply, reserved judgment.

LORD COMMISSIONER LANGDALE:—

July 15th.  
 —  
 Judgment.

This was a motion to discharge an order of Vice-Chancellor *Wigram*, whereby it was ordered that the Defend-

(a) Ante, p. 201.

pendix, 407.

(b) *Gow* on Partnership, Ap-

(c) 10 Jur. 512.

1850.  
INDERWICK  
v.  
SNELL.  
—  
Judgment.

ants *Snell, Hamilton, and Wheatley*, should be restrained from doing, authorising, or permitting any act as directors of *The London Conveyance Company*, except as therein mentioned, and also from preventing or interfering with the Plaintiffs and the Defendant *Johnson* in the exercise of their powers as directors of the Company.

There are other directions in the order, which it does not appear to be necessary to enumerate on this occasion.

There were six directors of the Company, *Inderwick, Cowan, Johnson, Snell, Hamilton, and Wheatley*.

In the year 1849, disputes took place. Mr. *Snell* charged *Inderwick, Cowan, and Johnson*, with misconduct; and at length an extraordinary general meeting of the shareholders, one of the objects of which was to remove *Inderwick, Cowan, and Johnson*, from being directors, was convened. The meeting was held on the 20th of December, and it was then resolved that *Inderwick, Cowan, and Johnson*, should be removed. This removal is the act principally complained of by the bill, and in respect of which relief is sought.

The Plaintiffs allege, first, that the Defendant *Snell*, and others, used improper and fraudulent means to procure the resolutions to be passed; secondly, that the meeting was illegally convened; and thirdly, that no legal grounds of removal were substantiated.

On the other hand, in the first place, the alleged fraud is denied; next, the meeting is alleged to have been convened and conducted with regularity; and thirdly, it is contended that it was lawfully in the power of the shareholders assembled at the time to consider and determine the question, whether the grounds of removal then alleged

were or were not reasonable; and, that the meeting having considered that there were reasonable grounds of removal, this Court has no authority to control its decision.

1850.  
 {  
 INDERWICK  
 v.  
 SNELL.  
 —  
*Judgment.*

As we do not think that there is any sufficient evidence of the fraud alleged, we have had to consider—

I. Whether the meeting was regularly convened; and if so,

II. Whether the shareholders thus assembled had sufficient authority to remove the directors in the manner they did.

On reading the clauses of the deed relating to the calling of meetings of the shareholders, we are of opinion that the meeting of the 20th of December, 1849, was regularly convened, and that it was lawful for the shareholders there assembled to consider and determine the question, whether the directors complained of should be removed. It was no legal objection to the consideration and determination of that question, that notice was given that other questions were to be considered at the same meeting.

Now the 27th clause of the deed provides that an extraordinary general meeting, specially called for the purpose, may remove from his office any director or auditor for negligence, misconduct in office, or any other reasonable cause.

The argument for the Plaintiffs rested on the allegation, that the general cause of removal referred to in the clause being expressed to be "reasonable," prevents the power referred to from being a power to remove at pleasure, arbitrarily, or capriciously; and made it requisite that the proceeding for exercising the power should be in its nature judicial, and that the reasonable cause should be

1850.  
INDERWICK  
v.  
SHILL.  
—  
Judgment.

such as a Court of justice would consider good and sufficient.

If this argument could be sustained, all proceedings at such meetings would be subject to the review of the Courts of justice, which would have to inquire whether the cause of removal which was charged was in their view reasonable; whether the charges were *bonâ fide* brought forward; whether they were substantiated by such evidence as the nature of the case required; and whether the conclusion was come to upon a due consideration of the charge and evidence. But the deed is silent as to these matters, and the question is, whether any such power of control in the Courts of justice is to be inferred from the words "reasonable cause," contained in the 27th clause; whether the expression "reasonable cause," contained in such a deed of a trading partnership can be held to be such a cause as, upon investigation in a Court of justice, must be held to be *bonâ fide*, founded on sufficient evidence, and just; or whether it ought not to be held to mean such cause as, in the opinion of the shareholders duly assembled, shall be deemed reasonable. We think the latter is the true construction and effect of the deed. In a moral point of view, no doubt every charge of a cause of removal ought to be made *bonâ fide*, substantiated by sufficient evidence, and determined on a due consideration of the charge and evidence; and those who act on other principles may be guilty of a moral offence; they may be very unjust; and those who (being present at the meeting) are innocently misled by the statements made to them, have no doubt a just right to complain that they have been led to concur in an unjust act. But the question is, whether, by this deed, the shareholders duly assembled at a general meeting might not or had not a right to remove a director for a cause which they thought reasonable, without its being incumbent upon them to prove, or be able and prepared to prove, to this or any other Court of justice, that the charge

was true and the decision just, or that the case was substantiated after a due consideration of the evidence and charge. We cannot take upon ourselves to say, that in the case of a trading partnership like this, this Court has, upon such a clause in the deed of partnership, jurisdiction or authority to determine whether, by the unfounded speech of any supporter of the charge, the shareholders present may not have been misled or unduly influenced.

1850.  
 {  
 LINDERWICK  
 v.  
 SNELL.  
 —  
 Judgment.

All such meetings are liable to be misled by false or erroneous statements; and the amount of error or injustice thereby occasioned can rarely, if ever, be appreciated. This Court might inquire whether the meeting was regularly held, and, in cases of fraud clearly proved, might, perhaps, interfere with the acts done. But supposing the meeting to be regularly convened and held, the shareholders assembled at such meeting may exercise the powers given them by the deed. The effect of speeches and representations cannot be estimated; and for those who think themselves aggrieved by such representations, or think the conclusion unreasonable, it would seem that the only remedy is present defence, by stating the truth and demanding time for investigation and proof, or the calling of another meeting, at which the whole matter may be reconsidered. The Plaintiffs, objecting to this meeting and considering it illegal, protested against it, but abstained from attending, and therefore made no answer or defence to, and required no proof of, the charges made against them. The adoption of this course was unfortunate, but does not afford any ground for the interference of this Court.

We are far from thinking that the charges made by Mr. *Snell* against the Plaintiffs and Mr. *Johnson* were well founded. He appears to have made a very exaggerated, and, in some respects, an unfounded statement; and in



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 Inderwick  
 v.  
 Snell.  
 —  
 Judgment.

the present state of the evidence, if the question were, whether the charges were well founded, we might think it our duty to say that they were not. But as the real question is, whether the shareholders at the meeting had not a right to remove directors for such causes as to them seemed reasonable,—and as we think that on the true construction of the deed they had such right, the order granting the injunction ought to be discharged.

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July 11th,  
 18th.

Where a person whose depositions have been taken *de bene esse* might have been, but was not, examined between the time when the cause was at issue and the time when publication passed, publication of these depositions will not be allowed.

In a bill for an account, depositions were taken *de bene esse* as to the correctness of entries in partnership books, but they were not published before the decree. An application to have them published afterward, in order that they might be used in the Master's Office, was refused.

#### FORSYTH v. ELLICE.

THIS was an application on behalf of the Defendant *Ellice*, to discharge an order of the Vice-Chancellor *Wigram*. The question was, whether certain depositions which had been taken *de bene esse* before the cause was at issue, and not published before the hearing, might now be published after the hearing, for the purpose of being used before the Master to whom the cause was referred. The case is fully stated in 7 Hare, 290.

The object of the suit was to recover the share which the Plaintiffs claimed in the property and effects of the late firm of Sir *Alexander M'Kenzie & Co.*, of Canada. Many of the entries in the books of the partnership, relative to the transactions mentioned in the pleadings, had been made by *Charles Tait*; and, upon the allegation of the Plaintiffs, that he was the only witness who was capable of proving the correctness of those entries, an order had been made before the cause was at issue, for the examination of *Charles Tait de bene esse*. Witnesses were afterward examined on both sides, and it did not appear that *Charles*

*Tait* might not have been examined in the usual way. He was not, however, examined after the cause was at issue, nor was any order applied for that his depositions taken *de bene esse* might be published. A decree was made in July, 1845, by which certain accounts were directed, and the Plaintiffs were now desirous of using the depositions of *Charles Tait* in the Master's Office, as to the particular items in the accounts respecting which he had been examined. The Plaintiffs therefore moved, that his depositions might now be published, and in support of the application, they produced affidavits that *Tait* had become insane in 1846. The Vice-Chancellor *Wigram* expressed his opinion, that a witness might be examined *de bene esse* after the decree, but directed the motion to stand over, for the purpose of enabling the Plaintiffs to adduce further evidence as to the witness's state of mind. This was the order which the Defendant now sought to discharge.

1850.  
 FORSYTH  
 v.  
 ELLIOT.  
 Statement.

The *Solicitor-General* and Mr. *Brett*, in support of the motion, cited *Fitzpatrick v. Webb* (a), and insisted, that, where a witness might have been examined in the usual way, but the party who wished to have his evidence had neglected to examine him, the depositions of the witness taken *de bene esse* could not be made use of.

Argument.

Mr. *R. Palmer* and Mr. *Dickinson*, for the Plaintiffs, insisted that the points to which the evidence of this witness related were disputed items in the accounts, and it would have been improper to examine witnesses for the hearing, as to these particulars: *Law v. Hunter* (b), *Walker v. Woodward* (c), *Duke of Hamilton v. Meynal* (d). If such evidence had been offered, it ought not to have been admitted as forming any part of the foundation for the

(a) 2 Molloy, 313.

(c) 1 Russ. 107.

(b) 1 Russ. 100.

(d) 2 Dick. 788.

1850.  
 FORSYTH  
 v.  
 ELLICE.  
 ———  
*Argument.*

decree: *Tomlin v. Tomlin* (a). The only evidence which was required for the hearing was such as would shew the liability of the Defendant to account; but the items of the account would only be examined in the Master's Office after the decree (b). A reference to the Master, to inquire as to particular circumstances, was in the nature of a new issue joined: *Smith v. Althus* (c); and this evidence was adduced to meet it.

Mr. W. M. James replied for the *Solicitor-General*.

*July 15th.*  
 ———  
*Judgment.*

LORD COMMISSIONER LANGDALE:—

In this case a motion was made before Vice-Chancellor *Wigram*, that the depositions of a witness taken *de bene esse* might be published; and it was ordered that the motion should stand for further evidence as to the state of the witness's mind, with a view to ascertain whether he was then capable of being examined. The Defendant *Ellice* now moves to discharge that order, and that the motion for the publication of the depositions may be refused.

The original bill was filed in June, 1837, and answered on the 20th of August, 1838; and being amended in February, 1839, another answer was put in on the 20th of May, 1842. The bill was further amended, and another answer was put in in 1843, and a replication in the causes was filed on the 16th of April, 1844. In the meantime the Plaintiffs moved that *Charles Tait* should be examined as a witness *de bene esse*. The application was supported by two affidavits; one of *William Forsyth* and *John Blackwood Forsyth*, who stated that they were informed and

(a) 1 Hare, 241, n.

(b) 2 Dan. Ch. Prac. 416 (1st edit).

(c) 11 Ves. 564.

believed that *Charles Tait* was a very material witness on their behalf in the causes, and that, without his evidence, they could not safely proceed to a hearing therein; that he was the only witness to some of the facts and circumstances connected with the matters in question in the cause, which, they were advised, were material and necessary to be proved therein. The other affidavit was that of *John Rance Heawood*, who stated that the entries in the books of *Sir Alexander Mackenzie & Co.*, touching the transactions mentioned or referred to in the pleadings, or many of them, were made by *Charles Tait*, and that various accounts touching such transactions were made out by the said *Charles Tait*, who was the only witness who could prove the correctness of the entries in the books and the accounts so made out by him.

Upon these affidavits an order was made for the examination of the witness *de bene esse*, and he was examined accordingly.

The causes being at issue, witnesses were examined on both sides, in the usual course. The Plaintiffs did not (as, for anything which appears to the contrary, they might have done) examine *Charles Tait* regularly as a witness in the cause. If he had died or become incapable before publication, or before the examination of witnesses had been completed, his depositions taken *de bene esse* might have been published. But it does not appear that the occasion arose for asking for an order for that purpose; and in July, 1844, publication passed in the regular way. A decree was made on the 11th of July, 1845. *Charles Tait* is said to have become insane in 1846; and, on the 14th of January, 1850, the motion was made to publish his depositions, and that the same might be read before the Master to whom these causes were referred.

1850.  
 FORSYTH  
 v.  
 ELLIOT.  
 —  
*Judgment.*

1880.  
FORSYTH  
v.  
ELLICE.  
—  
*Judgment.*

This motion was supported by the affidavit of *Robert Cowie*, who stated that *Thomas Thain* left *Canada* in 1826, and that, after his departure, the books of account referred to were kept or made up by *Charles Tait*, who was the only person who (but for the unsoundness of his mind) could give evidence of the accounts, and of the errors and corrections existing in such accounts; and by the affidavit of *Francis Ommaney*, who states, that, in proceeding to take the accounts, the Master has called on the Plaintiffs to produce evidence relating to, or explanatory of, contested items of account between the Plaintiffs and the Defendant, and that *Charles Tait* is the only person who (but for his insanity) would be able to give such evidence.

The question is, whether, under the circumstances here stated, the motion ought not to have been refused. The *Vice-Chancellor* considered, that if it had been proved that the witness was insane at the time when the motion was made, the depositions ought to have been published.

There can be no doubt that, according to the general rule, depositions taken *de bene esse* in a cause are not to be published, in cases where the witness might have been and was not examined: not, however, construing the words "might have been," so strictly as to make it absolutely necessary that an examination of, or an endeavour to examine, the witness should be made at the earliest possible moment of the period during which the examination might or ought to have been made; but the proper period for examination is between the time when the cause is at issue and the time when publication passes; and if, during this period, the witness, whose depositions *de bene esse* it is desired to publish, might have been and was not examined, publication of depositions taken *de bene esse* has not in any case been allowed. All general rules may, however, be liable to some exception in a special case.

A special reason for not examining the witness in this case is stated to be, that, according to two cases before Lord *Gifford*, witnesses ought not to be examined before the hearing as to disputed items of account.

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 FORSYTH  
 v.  
 ELLICE.  
 ———  
*Judgment.*

Without repeating observations which have often been made on those cases, there is no doubt, that, in a case where the right or liability to account, and the general authenticity of books and accounts (and not particular items) were alone in question, it would be improper to examine witnesses upon particular items of account not specially charged to be erroneous in the pleadings. In this case it is not stated in the pleadings, and in the affidavits it does not appear, that particular items were charged to be erroneous, or that the intention was to examine the witness concerning particular items of account. The witness, as appears by the affidavits, was intended to prove the correctness of the entries made by him in the books and in the accounts made out by him. He might, therefore, under the order have been properly examined to the fact, whether the entries which he had made in the books and accounts were correct; but he could not have been properly examined for the purpose of proving errors, or special facts not charged in relation to particular items of the account; and depositions taken upon particular items of account (of the impeachment of which the other parties had no notice) could not, as it seems to us, be read against the Defendants.

The opposition to the motion was also supported by reference to the case of *Smith v. Althus* (a), in which it was correctly stated by Lord *Eldon*, that when the Court directs an inquiry into a fact, it is in the nature of a new issue joined; but that issue arises out of facts charged or

(a) 11 Ves. 564.

1850.  
FORSTYER  
v.  
ELLISON.  
Judgment.

alleged in the cause, and the trial of it proceeds in a regular manner, the examination of witnesses in the Master's Office being founded on facts specially charged. If in this case it were held, that, upon the accounts to be taken in the Master's Office, the issues were new, as is assumed in the argument, and that the witness examined *de bene esse* was not examined on facts in any way appearing to be put in issue at the time when he was examined, the other parties, who could not be aware of the subject of the examination, might be exposed to the greatest injustice.

We cannot think that this is merely a question of strict practice. Various occasions occur in which the examination of witnesses *de bene esse* is absolutely necessary for the due administration of justice; and if the examination be properly conducted, the depositions, though not taken under all the sanctions which are desirable, must under proper circumstances be read and used. But the rule that the party obtaining such depositions must, if he have the opportunity, examine the witness in a regular manner, and with all the sanctions thought necessary in other cases, is also of great importance; and in this case we do not think that the special circumstances warrant any departure from the general rule.

It therefore appears to us, that the order complained of must be discharged.

1850:

## THE ATTORNEY-GENERAL v. ANDREWS.

June 24th.

**T**HIS was a motion to dissolve an injunction which had been granted by the *Vice-Chancellor of England*, to restrain the Commissioners of Water-works of the town of *Southampton*, from paying, or authorising or causing to be paid, any monies, being part of or arising or to arise from rates levied under or by virtue of the Act of Parliament mentioned in the pleadings, in applying for a new Act of Parliament.

By a local Act of Parliament commissioners were appointed to construct such reservoirs and other works as might be necessary for supplying a town with water, and to do all things necessary for that purpose; and they were authorised to levy rates for the purposes of that Act. The supply of water was found insufficient, and the commissioners were desirous of bringing water from other places, so as effectually to carry out the objects of the Act:—*Held*, that they were not authorised in applying any of the monies received from such rates in payment of the expenses of making application to Parliament for another Act to extend their powers: and an injunction was granted to restrain them from so doing.

In 1836, an Act was passed, (6 & 7 Will. IV, c. xcvi) intituled "An Act for maintaining the public conduits and other water-works belonging to the town of *Southampton*, and for providing an additional supply of water for the inhabitants of the said town and neighbourhood." After appointing the Commissioners of Water-works of the town of *Southampton*, the Act proceeded, by sects. 30 & 31, to authorise them to maintain the then existing conduits, reservoirs, and other water-works belonging to the said town, and to improve and extend the same, and particularly to enlarge the then existing reservoirs on the common near *Southampton*, and to build, erect, construct, and maintain such other reservoirs or water-works on the said common, as might be necessary or convenient, and as the said Commissioners should think proper, for furnishing an additional supply of water, and from time to time to alter, repair, or discontinue the same works or any of them, and to substitute others in their stead, and generally to do and execute all other matters and things necessary or convenient for constructing, continuing, maintaining, altering, repairing, or using the said works, and also to collect and raise water, by boring in or under the said common, or by such other ways and means as they might from time to time think proper, and to take and use any springs or streams of water, which might be



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ANDREWS.  
—  
Statement.

found in constructing the said works, they, the said Commissioners, doing as little damage as possible, and making compensation for any injury that might be sustained by the exercise of such powers. And by the 42nd section, it was further enacted, that the Commissioners should, every six months thereafter, make an assessment upon all the occupiers of messuages, tenements, &c., who should be rated and pay to the poor rates within the said town of *Southampton*, and also on the owners of all messuages, tenements, &c., within the said town, by an equal pound-rate, as the said Commissioners should direct, not exceeding 1s. in the pound for any one year; and by that sect. and the 64th sect., the Commissioners were directed, out of the monies collected by such rates or assessments, to pay the charges and expenses of procuring that Act, and to pay monies already borrowed under the authority of former Acts, and to apply the funds in maintaining and repairing the works, "and in otherwise carrying that Act into execution."

After setting out the purport of this Act to the effect above mentioned, the information proceeded to state, that extensive works had been carried on under the provisions of the Act; and that, in consequence of the recommendations of a committee, called "The Committee of Public Health," that a further supply of water should be provided for the inhabitants of the town, and that a new reservoir should be constructed on the common, a meeting of the Commissioners was held, at which it was resolved by a very large majority of the Commissioners, that the clerk be instructed to give the necessary notice for obtaining Parliamentary powers, to enable the Commissioners to carry into effect the recommendations of the said Public Health Committee; that such notice was accordingly given, and that it was therein stated, among other things, that the Commissioners intended to apply for a bill, to enable them to obtain powers for the construction of additional water-works,

for the better supply of the town with water, and for the construction and erection of necessary engines, buildings, reservoirs, and works for that purpose; and to enable the Commissioners to take water from certain lands and springs in the parishes of *North* and *South Stoneham*, and from the *River Itchen* Navigation in the county of *Southampton*, and from other places; and it was intended by the said bill, to obtain powers to compel the owners of all rateable property, included within the limits of the said bill, to be rated to and to pay all rates authorised to be levied under the said recited Act or the proposed bill, instead of the occupiers thereof. That, at a meeting of the said Commissioners of Water-works, held on the 3rd of December, 1849, it was, amongst other things, resolved that the sum of 250*l.* be advanced to the clerk, in part to meet the necessary expenses of obtaining the said intended Act of Parliament; and that, although such resolution was protested against, as being an unlawful application, or intended application, of the funds of the board, nevertheless, in furtherance of the resolution, a cheque was drawn by the board for the sum of 250*l.*, and was paid by the bankers on their account, out of monies raised and forming part of the rates levied under the above-recited Act. That the rates so raised and levied were public trust monies; and, under the circumstances aforesaid, no persons had any right to authorise the payment thereof, for any other purposes than those specified in the said Act; and the application of them towards defraying any of the expenses of the intended Act of Parliament, would be illegal and a breach of trust; that the said Commissioners of Water-works intended also to apply towards the expenses of the said application to Parliament for a new and additional Act, further large sums of money, being part of and arising from the said water rates, unless restrained from so doing by the order of the Court.

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 v.  
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 —  
*Statement.*

The information prayed, that it might be declared that

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 —  
*Statement.*

the rates raised under and by virtue of the said recited Act, were not applicable in or towards the payment of the expenses of attempting to procure the said intended new Act, or of preparing, or promoting, or prosecuting any such bill in Parliament, and for an injunction.

*Argument.*

Mr. *Rolt* and Mr. *Shebbeare* in support of the motion.—The Act was passed for the purpose of securing for the town of *Southampton* an adequate and proper supply of water; but the specific means which were then supposed to be sufficient for the general object of the Act, have proved defective. That defect can only be remedied by another application to Parliament; and that application might probably be the most direct and certain means of effecting the design for which the Act was originally passed. By the Act, the Commissioners are empowered to do all such things as might be necessary for the purpose mentioned in the Act, that is, to carry out the general object of it. It is clear that the Commissioners may expend the money in diverting springs, sinking wells, and trying a variety of experiments; and yet they are precluded, by this injunction, from adopting the readiest and most effective method of accomplishing the purpose of Parliament, and perhaps the only means by which it can be effectually carried out: *Bright v. North* (a), *Ware v. The Grand Junction Waterworks Company* (b), *Parker v. The River Dunn Navigation Company* (c).

Mr. *Malins* and Mr. *G. M. Giffard* appeared to oppose the application, but were not called upon by the Court.

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(a) 2 Phil. 216. (b) 2 Russ. & My. 470. (c) 1 De G. & S. 192.

LORD COMMISSIONER LANGDALE :—

The only question here is, whether the Commissioners are entitled, under the provisions of this Act of Parliament, to expend the money which belongs to the Commissioners in an application to Parliament for increased powers, to be exercised in a manner most beneficial to the town of *Southampton*. This Act of Parliament was passed in the year 1836, the object of it was—[His Lordship read the objects of the Act.]

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v.  
ANDREWS.  
Judgment.

What the Commissioners want is, to do more than this Act enables them to do; something they want to do; and I have no doubt they want to do it by means of funds raised by assessments under this Act. It is said, that this must be considered as incident to the objects which were in view under the powers given by the Act; but it does not appear to me to be so. Those powers are given to them for certain specific purposes; they have no occasion to apply to Parliament to get more. In *Bright v. North* (a) the Company were making a defence against aggression. The defence must be accommodated to the aggression. If defence can only be made by application to Parliament, then they might apply, but there is nothing of that kind; and as to the expediency of granting this injunction, the observations in that case are not applicable.

The *Vice-Chancellor of England* says, "I am not going to do anything which is opposed to the inhabitants of *Southampton*; let them subscribe the money. The only thing is, whether the monies to be raised for the purposes of the particular Act, are to be applied for purposes of a similar kind." This Act appears to me to be of such a nature that I think the *Vice-Chancellor* has come to a right conclusion.

LORD COMMISSIONER ROLFE :—

As to the application of the funds, the commissioners being a

(a) 2 Phil. 216.

1850.  
 ATT.-GEN.  
 v.  
 ANDREWS.  
 Judgment.

*quasi* Corporation, may do what they could not do without it, without being trespassers. They may take springs, or bore, or use other physical ways and means for raising and getting water. Then come the sects. which are important, (the 42nd & 64th) which authorise the Commissioners to raise money. How is it to be applied? The sects. 42 & 64 state all the ways in which the money may be applied; and unless the Commissioners apply it in some of those ways, they are misappropriating the funds; and I cannot think there is any discretion in the Court whether it will grant the injunction or not.

The Commissioners are authorised to apply the funds, first, in defraying the expenses of the Act, and then in enlarging sewers, &c., and "otherwise in carrying this Act into execution." It cannot be suggested, that this application of money can be authorised, unless it comes within the words "otherwise carrying this Act into execution." The section relied on by the *Lord Chancellor* in *Bright v. North*, was that which answered to the 64th. The funds were to be applied in doing, constructing, and executing all such works, acts, matters, and things, as they should from time to time deem necessary, proper, or expedient for putting the banks of the river therein mentioned into and maintaining the same in a permanent state of stability. The bill contained what the *Lord Chancellor* interpreted to be, a distinct charge that certain works, which parties were trying to get provisions for doing, would prevent them from maintaining the works in permanent stability. The *Lord Chancellor* said, they are proceeding to apply monies in maintaining them, and there is nothing to prevent them.

Here let us apply that principle to the present case. Suppose some parties were applying to Parliament for an Act to foul the water or carry off the stream. I think the Commissioners might apply a portion of the funds in attempting to prevent those parties from carrying that scheme

into execution. The object of the Act was to supply *Southampton* with water. The town of *Southampton* finds that the supply is not large enough, and the Commissioners want further powers. That is not carrying the Act into execution; and when it is said, that the present application is within the scope of the Act, I must controvert it. It is within the scope and object of the Legislature in passing that Act, but it is not within the scope of the Act itself.

1850.  
ATT.-GEN.  
v.  
ANDREWS.  
Judgment.

### DALGLISH v. JARVIE.

IN July, 1849, the Plaintiffs, who were calico printers, had obtained an *ex parte* injunction to restrain the Defendant from pirating a particular design referred to in the pleadings, and from publishing or selling any fabric to which such design, or any fraudulent imitation of it, should be applied, during nine months from the 9th of December, 1848; at the end of which nine months the copyright would expire, namely, in September, 1849. On the 17th of April, 1850, long after the expiration of the time over which the injunction extended, the Defendant obtained an order from the *Vice-Chancellor* to dissolve the injunction, with costs; and the Plaintiffs now moved that this last-mentioned order might be discharged or varied.

The Plaintiffs had registered the design on the 9th of December, 1848, according to the provisions of the 5 & 6 Vict. c. 100, and afterwards discovered that the Defendant was selling or exposing for sale printed calico, in which the Plaintiffs' design was copied or fraudulently imitated; and they consequently filed this bill and applied for an *ex parte* injunction, as already stated.

any of the fabrics mentioned in the Act, and registered, is a publication of it, the proprietor of all right to protection for that particular pattern—*Quære*.

June 24th &  
25th.

Where an *ex parte* injunction had been obtained, without stating to the Court that there was a question as to the construction of an Act of Parliament upon which the Plaintiffs' right might depend, the injunction was dissolved, although it did not appear that the Plaintiffs were aware, when they applied for the injunction, that any such question existed.

Whether, under the Designs Copyright Act (5 & 6 Vict. c. 100), the exhibition of a pattern on paper, before it is applied to

so as to deprive

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DALGLISH  
v.  
JARVIE.  
—  
*Statement.*

The Defendant had put in his answer in October, 1849, and alleged that the pattern in question had been copied from the French; and also stated, that in the usual course of proceeding in the Plaintiffs' business, designers who were in their employment produced new patterns, which were entered in books, and exhibited to their customers; and, if their customers ordered a sufficient quantity of any of those patterns, goods were then printed from those patterns; and that, in this case, the usual course had been adopted; and that, in fact, those patterns had been exhibited to the customers of the Plaintiffs for two months before the date of the registry of the design; and that such exhibition amounted to a publication of it before it was registered, and consequently the Plaintiffs were not entitled to any protection.

The arguments turned principally upon the construction of the 5 & 6 Vict. c. 100, it being contended, on the one hand, that the proprietor of a design could not obtain any protection under the Act, if he published it by frequent exhibition to his customers before he registered it; and, on the other hand, it being contended that the Legislature did not interfere to protect skill alone, but only skill when united with capital in the application of some design to an article of commerce; and they referred to the language of the 3rd, 4th, and 15th sects. of the Act.

The VICE-CHANCELLOR dissolved the injunction upon the ground that the Plaintiffs ought to have informed the Court of the doubtful construction of the Act, and of the question which consequently arose as to their title to any protection from the Court.

*Argument.*

Mr. Rolt and Mr. W. T. S. Daniel supported the motion; and

Mr. R. Palmer and Mr. Prendergast opposed it.

LORD COMMISSIONER LANGDALE, after going through the particulars of the case, said, that he was of opinion that the Plaintiffs had not stated to the Court all those circumstances which they ought to have mentioned; and that the decision of the *Vice-Chancellor* in discharging the injunction could not be disturbed.

1850.  
DALGLISH  
v.  
JARVIS.  
—  
Judgment.

LORD COMMISSIONER ROLFE concurred in the opinion of Lord *Langdale*, and added, that the principle on which the Court proceeded with regard to *ex parte* injunctions was very similar to that which was adopted in cases of insurance. There must be *uberrima fides*. It was not sufficient for a party to state all which he thought material, but he must state all which proved to be material; and if he failed to make such statement, in the one case the insurance was invalid, and in the other case the injunction, which was obtained upon such suppression of material circumstances, would be dissolved. In this case the Plaintiffs had omitted to make any mention of facts which were clearly of considerable importance, and therefore he thought the decision of the *Vice-Chancellor* was quite correct.



1849.

Dec. 5th &amp; 6th.

## MALCOLM v. SCOTT.

A *Calcutta* firm, by a letter, dated in January, and received in *London* on the 11th of March, 1841, directed their *London* correspondents to hold a sum of money (equal to a lac of rupees at the current rate of exchange), payable on the 19th of November following, out of remittances and consignments on the general account, at the disposal of a creditor of the *Calcutta* firm in *Liverpool*. The *Calcutta* house, at the same time, acquainted the *Liverpool* house of the directions which had been given. The *London* house

THIS was an appeal from a decision of the Vice-Chancellor *Wigram*, which is reported in 6 Hare, 570.

The *Vice-Chancellor* had directed a reference to the Master, to inquire what was the balance of the account between the *London* house of *Scott, Bell, & Co.*, and the *Calcutta* house of *Adam, Scott, & Co.*, on the 12th of March, 1841; and the Master was directed to debit the said *Calcutta* house with all monies paid, and all sums properly debited by the said *London* house, and all sums for which the said *London* house were then liable, which payments, debits, and liabilities, respectively, the said Master should find to have been made, or arisen, in respect of engagements existing on the 12th day of March, 1841, on the said general account; and that the said Master should credit the *Calcutta* house with all monies received, and all remittances and consignments on the said general account, received or at the disposal of the *London* house, before the receipt by the *London* house of the letter of the *Calcutta* house, dated the 18th day of January, 1842, in &c.; and all other sums (if any) for which the *Calcutta* house was entitled to credit in respect of the transactions depending on the said general account, up to the date of the receipt

informed the *Liverpool* house that they had received and registered the order; and, after stating that they were in advance of the *Calcutta* house, and declining to accept bills for any part of the amount, said, that if remittances should come forward to enable them to meet the wishes of the *Calcutta* house, they would lose no time in advising the *Liverpool* house. The *London* house also, in acknowledging to the *Calcutta* house the receipt of the order, said, that the state of their account did not then warrant them in meeting the requisition, but they would meet it, if in a position to do so before November. The *Calcutta* house revoked the order by a letter of January, 1842, received by the *London* house on the 12th of March, 1842. The Court below having directed an account to be taken in favour of the *Liverpool* house as against the *London* house, the Lord Chancellor, on appeal, directed the cause to stand over, with liberty for the Plaintiff to bring such action as he might be advised, to establish his right at law; and the Plaintiff subsequently failing in an action at law, the bill was dismissed.

When mercantile correspondence respecting the appropriation of funds in the hands of a consignee belonging to the debtor, does not constitute a legal contract on the part of the consignee to apply the funds in payment of the debt of the creditor;—whether the creditor may still support a claim to the funds on the ground of there being an equitable assignment—*Quære?*

of the last-mentioned letter; and to take an account of what was due to the Plaintiff.

1849.  
MALCOLM  
v.  
SCOTT.  
Statement.

The Defendants, *Scott, Bell, & Co.*, appealed from that part of the decree.

Mr. *Rolt*, Mr. *Roundell Palmer*, and Mr. *Schoyn*, appeared for the Plaintiff; and *Argument.*

The *Solicitor General* (Sir *John Romilly*) and Mr. *Cairns* for the Appellants.

The LORD CHANCELLOR:—

It is not merely because it is a question of contract that I think I ought not to decide this case without a trial at law. No doubt this Court can construe a contract as well as a Court of law—but it is peculiarly a matter on which a special jury are better able, under the direction of a Judge, to come to a right conclusion than any one else can be; because there are terms used, upon which, I dare say, a mercantile jury would put a very different construction than the world at large. At least, it is open to a question of mercantile usage; and where persons are using mercantile terms between each other, with reference to the custom of merchants, it is very difficult to come to a conclusion except with the aid of a jury composed of mercantile men. *Judgment.*

I think that the Court is not sufficiently informed, and that it had better withhold its decision until it has had the assistance of a jury. This is what the Appellants were willing to take in the Court below. If I had the least doubt about its being covered by the contract, one way or the other, and if it involved questions of equitable assign-

1849.  
MALCOLM  
v.  
SCOTT.  
—  
*Judgment.*

ment, of course I should not consider it at all necessary to send the parties to law; but that question of equitable assignment does not appear to me to have the least reference to the present case, because I consider this to be entirely within the breasts of the three parties concerned; and if they have come to any agreement, whatever the construction of that agreement may be, they, among themselves, had a clear right to regulate the interests of the parties to arise from the future consignments sent to this country from *Calcutta*. They did by a correspondence come to a contract, and the real question is, what is the effect of that contract, and how is it to operate on the state of the accounts as they ultimately stood?

It appears that the consignments received exceeded the amount of the Plaintiff's demand, after providing for contingencies, as they existed at the date of the contract being entered into. Therefore, on the one construction, if the parties have agreed, that is to say, if the *London* house have agreed, in concurrence with the Plaintiff, who is entitled to the benefit of the contract, and the house in *Calcutta* who offered the contract,—if, in point of fact, the house in *London* did agree to hold the net proceeds of consignments for the payment of this demand, then the fact that there were consignments which exceeded the amount of that demand, would be conclusive in favour of the Plaintiff's right. If, on the other hand, they never thought of entering into that contract, and what they really meant was, not for the *London* house to pay at all events the amount of the consignments, but that they would pay as soon as there was on the general account a balance in the Plaintiff's favour, so that in point of fact the contract was only to put the Plaintiff in the situation of the *Calcutta* house, viz. to honour his draft, instead of honouring the draft of the original correspondents in *Calcutta*—then the mere fact of the state of the account as it appears, (no doubt as it ex-

isted) would open the question to another solution ; so that either one way or the other those two states of circumstances being admitted, the question rests entirely on what the parties meant. That depends on certain expressions used, and certain arrangements proposed on the one hand and accepted on the other, to grow out of and to be applied to the mercantile transactions between the two or three parties. It does appear to me to be, of all others, a case which ought to be decided by a Court of law with the assistance of a jury of merchants, who are familiar with the subject-matter, and much better competent than any Judge can be to put a construction upon mercantile terms, and to take a right view of the transactions as between merchants who are in the habit of dealing with questions of this sort.

It is not because it is a question of contract merely, that I think this Court ought to require the assistance of a jury and a verdict, but because it is peculiarly a contract which a jury are competent to deal with. And seeing, unquestionably, that there is a great deal to be said on both sides of the question as a matter of contract, and the difficulties arising in a great degree from the custom of merchants, and from mercantile expressions used, I think it is much safer and much more consistent with the course and practice of this Court in a case like this, to hold its hand, and not to interfere until the Plaintiff has proceeded at law, if he can, to establish his claim. If he can establish this claim, what the Court has to do is simple enough after that. It appears, that on the state of the account the question would arise ; at the same time I do not think that the party, having come here in the first instance, without having brought an action, if the Court thinks it is a proper case for an action and for the assistance of a Court of law, is, therefore, at all precluded from the opportunity, or the right, to go to law to have that question ascertained.

I am asked upon this appeal, the *Vice-Chancellor* having

1849.  
MALCOLM  
v.  
SCOTT.  
*Judgment.*

1849.

MALCOLM

v.

SCOTT.

Judgment.

come to a conclusion in favour of the Plaintiff, upon the ground that the parties meant to undertake to pay out of the proceeds of the consignments, without reference to any intermediate transaction between the *London* house and the *Calcutta* house, to consider the Defendants as liable under their contract to pay it. I do not give any opinion upon that, because, if I am not to decide it, it is much better I should not.

It appears to me to be a question which has so much difficulty about it, connected with the circumstances and connected with the peculiar expressions, that it would be better it should be matter of legal decision, inasmuch as it is a pure question of law growing out of mercantile transactions.

What I propose, therefore, is, that instead of the decree pronounced by the *Vice-Chancellor*, the cause shall be ordered to stand over, with liberty to the Plaintiff to bring such action as he may be advised against the *London* house, or whoever represents the *London* house, for the recovery of the amount of his demand; it being admitted that the amount of the consignments received, after liquidating the dependencies existing at the time when the contract was entered into, exceeded the amount of the Plaintiff's demand; but on the other hand, it being also admitted that the bills and cheques paid by order of the house in *Calcutta* by the *London* house were such as at all times to exceed any of the monies received, so that in point of fact there was no actual balance which the *Calcutta* house could have drawn upon.

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In consequence of this judgment of the *Lord Chancellor*, the Plaintiff brought an action against the Defendants, which was tried at the *Liverpool Assizes*, in April, 1850, before Mr. Baron *Rolfe*, who nonsuited the Plaintiff, holding that the question was a question of law to be decided

by the Judge, and that no contract could be founded upon the correspondence. That decision was afterwards unanimously affirmed by the Court of *Exchequer*. The cause was afterward, in November, 1850, brought on before the Lord Chancellor *Truro*, who considered that Lord *Cottenham* had already decided that the correspondence did not raise a question of equitable assignment; and that, as the result of the trial at law had established that there was no legal contract, the bill must be dismissed.

1850.  
MALCOLM  
v.  
SCOTT.

WHITWORTH v. WHYDDON.

Jan. 11th.

THE Plaintiffs had applied to the *Vice-Chancellor of England* for a receiver of the personal estate of *Eliza Whitworth*, pending litigation in the Ecclesiastical Court for the purpose of having her will declared void. The *Vice-Chancellor* refused the motion with costs; and it was now renewed before the *Lord Chancellor*.

The Court will not grant a receiver pending litigation in the Ecclesiastical Court for probate of a will, unless it is shewn that the property is in such a position that it requires protection in the meantime, and that it might be lost or in danger if there were no one to receive it.

The deceased died on the 16th of September, 1849, at the house of the Defendant, where she was stopping on a visit. In the afternoon of the preceding day, she made a will, by which she bequeathed a considerable portion of her property to Mrs. *Whyddon*, and appointed Mr. *Whyddon* executor. The Plaintiffs, who were her next of kin, contended that, at the time of the execution of her will, she was not competent to do such an act. The Defendant had taken possession of various articles belonging to the deceased, which were in his house at the time of her death. She was also possessed of money on mortgage, and shares in different public companies, which, though stated in the bill, were omitted in the affidavit in support of the motion before the *Vice-Chancellor of England*.

Observations as to the admissibility of fresh affidavits on an appeal motion.

1850.  
 WHITWORTH  
 v.  
 WHYDDON.  
 —  
*Statement.*

The ground upon which the *Vice-Chancellor* refused the motion, was, that where the party who was named as executor in the will was the person who was in possession of the property, it was not the usual practice of the Court to appoint a receiver, but only where the property was outstanding.

*Argument.*

Mr. *Malins* and Mr. *Schomberg*, in support of the motion, cited *Rendell v. Rendell* (a), in which the Vice-Chancellor *Wigram* said, "where no probate or administration has been granted, it is of course to appoint a receiver, pending a *bonâ fide* litigation in the Ecclesiastical Courts to determine the right to probate or administration, unless a special case can be made for not doing so." They also referred to the judgment of Lord *Cottenham* as Lord Commissioner, in the case of *Watkins v. Brent* (b), and to the case of *King v. King* (c).

In order to shew what were the items, of which part of the outstanding property of the deceased consisted, they proposed to read some affidavits which had been filed since the motion was before the *Vice-Chancellor*; and relied on *Const v. Barr* (d), before Lord *Eldon*, as establishing their right to use those affidavits.

[The LORD CHANCELLOR.—A party is at liberty to use fresh affidavits, but he may renew the motion before the *Vice-Chancellor*. It is made on a new ground. If you are willing to take this motion on the evidence which was before the *Vice-Chancellor*, it is properly an appeal motion: but if you succeed on new affidavits, I am hearing the case in the first instance, and not on appeal. Do you rely on the case made before the *Vice-Chancellor*, or do you elect to use fresh affidavits?]

(a) 1 Hare, 154.

(b) 1 Myl. & Cr. 102.

(c) 6 Ves. 172.

(d) 2 Russ. 161.

Mr. *Malins* said that the affidavits before the *Vice-Chancellor* were sufficient to sustain the motion.

1850.  
WHITWORTH  
v.  
WHYDDON.  
Argument.

Mr. *Rolt* and Mr. *Follett*, contra, admitted, that this Court would appoint a receiver *pendente lite*, where there was a *bonâ fide* dispute, and where there was also property which required protection: but that no such protection was necessary in this case, for no mortgagor would pay his money, and no Company would pay their dividends, to parties who did not represent the deceased. The judgment in *Watkins v. Brent* (a), commenced by pointing out the practice: "There is no doubt that, by the rule of this Court, if the representation is in contest, and no person has been constituted executor, the Court interferes; not because of the contest, but because there is no proper person to receive the assets."

[The LORD CHANCELLOR said, that where the property was insignificant in comparison with the expense of a receiver, there was a great objection to the appointment of a receiver; and that there was no evidence here that any property would be in danger if the Court did not interfere.]

After some discussion, in which Mr. *Schomberg* referred to *In re Joseph and Webster* (b), before Lord *Lyndhurst*, and *Whitworth v. Gaugain* (c), before Lord *Cottenham*, it was agreed that the fresh affidavits should be read, in order to prevent the necessity of another application to the *Vice-Chancellor*, and the probability of another appeal: Mr. *Malins* undertaking not to reply, and agreeing that Mr. *Rolt* should reply upon the fresh evidence.

(a) 1 Myl. & Cr. 102. (b) 1 Russ. & My. 496. (c) Cr. & Ph. 335.



1850.

WHITWORTH

v.

WHYDDON.

*Judgment.*

The LORD CHANCELLOR said, that the only property which was in the hands of the Defendant was stated not to exceed the value of £150; and that, for property which was so trifling in its value compared with the expense of a receiver, the Court would not interfere, although the circumstance, that the executor was the party who had possession of the property, was not enough to prevent the Court from appointing a receiver. If the outstanding property were in any danger of being lost, because there was no person to receive it, the case would be different. The mortgage was vested in one of the next of kin of the deceased, who was one of the Plaintiffs. His Lordship did not think there was any sufficient ground shewn at present for the expense of appointing a receiver; but if any new facts arose, this motion would not prevent another application being made.

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Mr. *Schomberg*, as *amicus curiæ*, stated that the case of *Const v. Barr* (a) had been generally considered as establishing the rule, that, upon an appeal motion before the *Lord Chancellor*, fresh affidavits were admissible; and that it would be very satisfactory to the profession to know how far they might still consider it as an authority, as his Lordship's observations seemed rather to imply that fresh affidavits could not be received on appeal motions.

The LORD CHANCELLOR—I never said any such thing. You have had the benefit of your fresh affidavits in this very case. I said quite the reverse.

(a) 2 Russ. 161.

1850.

January 16th.  
Feb. 16th &  
23rd.

*In re FISHER, a Lunatic.*

THE lunatic, Miss *Elizabeth Fisher*, was of the age of 50 years; and the only property to which she was entitled was a sum of 750*l.* in the Three per cent. Bank Annuities, the income of which was 21*l.* 16*s.* 11*d.* per annum. The Master certified by his report that the whole income ought to be applied for the maintenance and support of the lunatic.

Where the income of a lunatic amounted to 21*l.* 16*s.* 11*d.* only, the Lord Chancellor refused to allow a sum of 60*l.* per annum for maintenance, but allowed part of the principal of her property to be sold to purchase an annuity of 30*l.* per annum.

She had been in *St. Luke's Hospital* from July, 1848, to July, 1849, and the inquisition on which she was found a lunatic was held in August, 1849. The present petition was presented by her committees and next of kin and heir-at-law; and it stated that the income was insufficient for her proper support; that she had been placed upon the list of incurable patients at *St. Luke's Hospital*, and there was a great probability of her being admitted into the Hospital again within three years and placed upon the incurable list there, when a payment of 7*s.* a week only would be required to be made on her behalf. The petition asked, that, until she should be re-admitted into *St. Luke's*, an annual sum of 60*l.* might be allowed for her maintenance, and that a competent part of the Bank Annuities might be sold from time to time to make up the sum.

Mr. *Hardy* appeared for the petition, which stood over for inquiry to be made respecting the probability of her being admitted into *St. Luke's Hospital*. It was ascertained that the amount of her property rendered her ineligible for re-admission; and that, even if she were eligible, she would not be likely to be re-admitted for five or six years.

*Argument.*

1850.

*In re*  
FISHER.

The LORD CHANCELLOR declined to make any order for allowing 60*l.* a-year.

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On the 23rd of February the matter was again mentioned, when it was stated that the *West London Savings Bank and Government Annuity Institution* would grant an annuity of 30*l.* per annum for the life of the lunatic, for a sum of 397*l.* 12*s.* and 30*s.* office fees, but that 30*l.* was the highest amount for which they granted an annuity; and it was asked that a competent part of the Bank Annuities might be sold to purchase such an annuity.

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The LORD CHANCELLOR made the order.

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May 30th.

GRAHAM v. THE BIRKENHEAD, LANCASHIRE.  
AND CHESHIRE JUNCTION RAILWAY COM-  
PANY.

Although the Court will interfere by injunction, in proper cases, to restrain a Company from constructing a small portion only of their works, with a view of abandoning the remainder, yet, where such an intention had been known to the shareholders, or they had had an opportunity of knowing it many months before the filing of a bill to prevent such proceeding, and had made no application to the Court, such acquiescence on the part of the shareholders was held to have created a counter-equity; and the Court refused to grant an injunction for that purpose.

THIS application was heard by Lord *Cottenham* at his private residence, in consequence of his Lordship's illness. It was made on behalf of the Defendants to dissolve an injunction, which had been granted by the *Master of the Rolls*, to restrain the Defendants from making a Railway from *Chester* to *Lower Waiton* only, and from applying the funds of the Company to any other purpose than completing the whole of the line of their Railway; and also from borrowing a sum of 200,000*l.* and making any further calls or enforcing some calls already made, and from taking proceedings to forfeit shares for non-payment of those calls.

The Plaintiff was a shareholder of some of the 31*l.* shares in the Company, and filed this bill on behalf of himself and all other shareholders except the Defendants, against the Company and the Directors. The statements in the bill were to the following effect :—

1850.  
 GRAHAM  
 v.  
 THE BIRKEN-  
 HEAD, LANCASHIRE AND  
 CHESHIRE  
 JUNCTION  
 RAILWAY Co.  
 ———  
*Statement.*

By an Act, 7 Will. IV & 1 Vict. c. cvii. (1837) a Company was formed, with powers to make a Railway from *Chester* to *Birkenhead*. This Railway had since been completed. By another Act, 9 & 10 Vict. c. xci. (1846), a Company was formed, with powers to form a Junction Railway between a place on the *Manchester* and *Birmingham* Railway and another place on the *Chester* and *Birkenhead* Railway, so as to form a junction between those two lines with branches. This proposed Railway was to extend 46 miles, and had not been completed. They had power to borrow 500,000*l.* when the whole capital had been subscribed for and half of it paid up.

By a third Act, 10 & 11 Vict. c. ccxxii. (1847), the two Companies formed by the first two Acts were amalgamated. By this Act three sets of shares were created, one consisting of shares of 27*l.* 10*s.* each, another of shares of 22*l.* each, and the third of shares of 31*l.* each ; and the shareholders were to share the profits of the Company equally, in proportion to the amount actually paid up on their shares.

The Directors of the Company finding difficulty in raising the necessary funds to complete the undertaking, suspended their works in September, 1847; and they continued suspended till the Spring of 1849. During that interval, they formed a plan for abandoning the line except 17 miles from *Chester* to *Lower Walton*, and they proposed that this short line should communicate with the *London* and *North-Western* Railway. In November, 1848, a meeting of the shareholders sanctioned this project; and in the following

1850.  
 GRAHAM  
 v.  
 THE BIRKEN-  
 HEAD, LANCA-  
 SHIRE AND  
 CHESHIRE  
 JUNCTION  
 RAILWAY CO.

*Statement.*

Session of Parliament the Directors introduced a bill for carrying it into effect. It was, however, objected to by many of the shareholders, and was consequently abandoned, with the approval of a large majority of the shareholders at a general meeting. The powers of the Company for taking land compulsorily expired in June, 1849.

In February, 1849, the Directors made a call of 10*l.* a share on each of the 31*l.* shares; and in consequence of the non-payment of the call, they declared some shares forfeited in the following month of December; and thereby put a stop to any further proceedings in a suit which had been instituted in August, 1849, by one of the shareholders, to restrain them from making the 17 miles of Railway only.

In January, 1850, a meeting of the shareholders came to a resolution that 200,000*l.* should be borrowed by the Company. At that time, half of the capital had not been paid up. A few days afterwards, the Directors declared a call of 2*l.* on each of the 22*l.* shares, and 3*l.* on each of the 31*l.* shares. In the beginning of the following month (February, 1850) another of the shareholders filed a bill for a purpose similar to that of this present suit. It was alleged, that this suit had been compromised; at all events, it had been dismissed by consent.

The present bill was filed in May, 1850; it alleged that the Directors had determined not to construct any other part of the line except that from *Chester* to *Lower Walton*; and that the calls of 10*l.*, 2*l.*, and 3*l.* were made exclusively for the purpose of constructing that particular portion of the line. The bill prayed a declaration, that it was not within the powers of the Company to make that portion only of the line, or apply any part of the funds of the Company for that purpose, or enforce payment of the calls, or to raise money on loan for that purpose; and for an injunction.

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By the order made by the *Master of the Rolls* on granting the injunction, he provided that it should not extend to restrain the Directors from making calls or enforcing payment of the calls already made, for the purpose of discharging any liabilities of the Company which existed before the bill was filed, or for paying the contractor for any of the works done before the bill was filed.

1850.  
 GRAHAM  
 v.  
 THE BIRKEN-  
 HEAD, LANCA-  
 SHIRE, AND  
 CHESHIRE  
 JUNCTION  
 RAILWAY Co.  
*Statement.*

The Defendants now moved to discharge that order and to dissolve the injunction.

Mr. *Bethell*, Mr. *Roupell*, and Mr. *Glasse* appeared in support of the motion; and *Argument.*

Mr. *R. Palmer* and Mr. *Cole* opposed it.

The LORD CHANCELLOR:—

I feel great difficulty and anxiety on this matter, because undoubtedly the principle, which has been laid down in former cases, is one to which I must adhere, and from which I do not see any ground for departing. Parties who have subscribed their money for one purpose, are not to be told that the Directors or a majority of the Company are of opinion that it would be very advantageous to employ it for another. But the difficulty I have here is, whether, in this case, the interference by way of injunction, which is the mode in which the Court exercises its jurisdiction to enforce an equity, is not counteracted by an opposing equity on the other side; because, in many of these cases the interposition of the Court may produce the greatest possible injustice if the parties have not applied in time, but have permitted things to get into that state which makes the injunction a proceeding not only not enforcing an equity, but calculated to inflict great hardship and injustice.

*Judgment.*

1850.  
 GRAHAM  
 v.  
 THE BIRKEN-  
 HEAD, LANCA-  
 SHIRE, AND  
 CHESHIRE  
 JUNCTION  
 RAILWAY CO.  
*Judgment.*

Now, what are the facts of this case? I do not mean to go into a detail of dates, but the fact is, that long ago every shareholder who took the trouble to inform himself of the state of the property in which he had embarked, must have been aware that the whole scheme could not be carried out. This was distinctly known in November, 1848. The moment it was known that the whole scheme could not be carried out, the question arose, whether the party who subscribed his money did or did not acquiesce in its being applied to carry out the works, so far as the money would go. A considerable period of time has elapsed since that knowledge came to every one of the parties who are represented by the Plaintiff in this suit: and for this purpose it is immaterial whether they have paid their calls or not. I am speaking of those parties represented by the Plaintiff, and he seems to have had that knowledge. Well, then, from November, 1848, down to the time when the bill is filed, the Company, knowing they could not go on with the whole work, proceed to carry it on to a certain extent—continue a contract which is of an earlier date than that—continue a contract with the party who contracted to do the work—lay out large sums of money for keeping the contractor at work—and of course come under liabilities to him. Was it not the duty of those who meant to dispute that, to make an application at once to a Court of Equity to prevent it? It seems to me, that, the moment that fact comes to the knowledge of any individual member of the Company, he (knowing that the Company, in the existing state of their finances, intended to go on with the work as far as they could,) should at once attempt to prevent them; and the question here is, whether, by remaining passive, he has not given rise to a new equity against himself, which deprives him of the right to prevent the Company from doing that which was contrary to the right which the shareholders had. I have not been able to discover any answer to that. It is said, there was the filing of a bill by another shareholder;

but that led to a compromise, and turned out to be nothing; and is that any answer at all to the right of these parties? It seems to me that this is quite beside any that I have hitherto heard; because in *Cohen v. Wilkinson* (a), there was no proof given of that sort of acquiescence which we have here.

1850.  
GRAHAM  
v.  
THE BIRKEN-  
HEAD, LANCA-  
SHIRE, AND  
CHESHIRE  
JUNCTION  
RAILWAY CO.

*Judgment.*

[Mr. *Bethell* said, that his Lordship had intimated in *Cohen v. Wilkinson*, that he should have disposed of that case in the same way, if there had been acquiescence; and he referred to the last part of the judgment in that case, in which it was stated, that as there was no evidence there of the alleged acquiescence, the bill must be dismissed (a).]

Yes, that is the equity between the parties; because, if those who have the management of the affairs of others, depart from the regular course, and there is an acquiescence, the parties interested, who have so acquiesced, cannot complain of their conduct in that mode of dealing with their affairs. That creates the difficulty on the part of the Plaintiff, in associating himself with the whole body of shareholders. Because, if that was so with regard to one, probably it was so with regard to others. At all events, it is an answer to those on whose behalf the Plaintiff sues. But it appears to me that the Plaintiff has not removed the bar to the interference of the Court, which arises from his own acquiescence. He knew the intention of the Directors in November, 1848; he knew it certainly when the Company endeavoured to get the authority of Parliament, to carry out part of their plan. It was their wish and intention to get the authority of Parliament; but having failed to obtain it, they go on with the works, thereby announcing to all concerned, that, although Parliament had not sanctioned it, they should proceed with their plan, trusting to the acqui-

(a) 1 H. & T. 564. See, also, 1 Mac. & G. 487.



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GRAHAM

v.

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HEAD, LANCA-  
SHIRE, AND  
CHESHIRE  
JUNCTION  
RAILWAY CO.*Judgment.*

escence or the approbation of those who were interested in making the most of the property which they had acquired.

Now, of course, a great deal of care and discretion is required in administering that sort of jurisdiction which arises with reference to these injunctions. The object is to protect the interests of the parties, whatever the situation of the parties may be. If the Court saw clearly, that, instead of protecting their interests, it would tend to the ruin of the great body of those concerned, the Court would be very cautious in exercising its authority. Seeing that these works have proceeded as they have for some time—seeing the large expenditure which has been made—considering the nearness of their completion, and the comparatively small sum that will be required to complete them—how can it be supposed that any body, having a legitimate interest in the ultimate realisation of profit from the works to be carried on, could derive any benefit from the injunction? What can be the result if the injunction be continued? The result must be, not only the loss of all the money which has been expended, but the property will go away altogether: there will be an end of the whole concern, and every shareholder will lose the whole of his money. That is a result that would be most lamentable, and one which the Court would be sorry should follow from any order it might make. I do not feel bold enough to administer an equity from the administration of which such frightful consequences are almost sure to arise.

But what is there on the other side? There is the danger of permitting money to be laid out, which, I may say, was not a mode of expenditure which the Acts of Parliament originally contemplated. The question is, whether those who are now complaining, and suing in respect of their interest in the money which they have paid, have, by the course of conduct which they have pursued, precluded

themselves from coming to a Court of equity to keep the parties strictly to that which was originally their right under the Act. Such matters must be in the discretion of the Court; and in the exercise of that discretion I cannot say I think it is at all questionable by which decision the interest of the parties would be best consulted. As the matter stands, my opinion certainly is, that the interest of the parties would be best consulted, if I were not to interfere by way of injunction.

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 v.  
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 SHIRE, AND  
 CHESHIRE  
 JUNCTION  
 RAILWAY Co.  
*Judgment.*

But, assuming that the parties knew, as they must have known, what the course of proceeding was, I consider that they have precluded themselves from coming to a Court of equity to ask for the exercise of its extraordinary jurisdiction, by the course which they have pursued in not coming earlier. On that ground, therefore, although it becomes a matter of extreme delicacy, with regard to cases which have been decided, and which may hereafter arise, to say what acquiescence is, I shall refuse to interfere by injunction in this case: and I must say, with a view to the decision of the present case, when I find knowledge, accessible at all events, and possessed probably, on the part of the Plaintiff, as to what must be the result—for the matter was not curable, because it was not a failure from accident or any other cause which could be remedied, but it was an actual failure from the state of the money market, placing the finances of the Company in a state which rendered it hopeless that the whole scheme could be carried out—I must say, it was the duty of the Plaintiff, as soon as there was this manifestation of intention on the part of the Company to carry on a work which must of necessity be of less extent than they had originally anticipated, to have inquired how the matter stood, and, if he wanted the interposition of a Court of equity, to have applied at once, and to have seen what a Court of equity would say in that state of things.

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GRAHAM  
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HEAD, LANCA-  
SHIRE, AND  
CHESHIRE  
JUNCTION  
RAILWAY CO.

*Judgment.*

It has not been suggested what possible remedy there could be for the expenditure that has been made, if the whole work is now stopped. It is a frightful sum to expend under any circumstances; but if the expenditure of that sum is to end in nothing being done, in the works never being completed, it may entail ruin upon a great many people, without there being the least possibility of good to anybody. It is also, no doubt, matter of consideration, that this Plaintiff, and those on whose behalf he files this bill, or some of them at least, (although it may not be owing to their failure in particular in paying calls, that the works cannot be carried on to the full extent), are defaulters, and that, as a body, a large sum is due from them, which creates or tends to create the difficulty which is supposed to give rise to the jurisdiction of the Court. Therefore, without feeling at all confident that the *Master of the Rolls* is not right in the conclusion to which he has come, I am bound to exercise the best discretion I can in reviewing his opinion; and upon the ground of acquiescence it is, that I consider the granting of the injunction is acting too stringently on an admitted rule. No doubt that rule should be acted upon in cases to which it is properly applicable; but it must be mitigated and confined within those limits which the rights of the parties require. I decide nothing but that I think the circumstances of this case are such as to preclude the Plaintiff from calling for the interposition of the Court, and that, therefore, the injunction must be dissolved.

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His Lordship continued the injunction to restrain the borrowing of 200,000*l.*, until one-half of the capital should be paid up, and dissolved the rest of the injunction.

1850.

PHILLIPSON v. GATTY.  
GATTY v. PHILLIPSON.

Jan. 22nd,  
23rd, 24th, &  
25th.

THE first-mentioned suit was instituted in March, 1844. In 1837, *Edward Gatty* and *Edward Owen* were the trustees of a sum of 2347*l.* 10*s.* 2*d.* 3*l.* per cent. Consols, and of a sum of 2000*l.* secured on mortgage. The interest of these trust-funds was payable to Mrs. *Eliza Partridge Burton Phillipson*, for her life, and after her death the principal was to be transferred to her son and daughter, *Richard Burton Phillipson* and the Plaintiff *Mary Ann Burton Phillipson*, if then living, in equal shares; but, if either of them died in the lifetime of the mother, leaving issue, then that share was to go to the issue. In 1837, the mortgage was paid off, and, in November in that year, the trustees lent the 2000*l.* to *Richard Burton Phillipson*, the payment of which he secured by the mortgage of a reversionary interest. This advance was made with the consent of Mrs. *Phillipson*, but without any concurrence on the part of the Plaintiff. In 1838, the trustees sold out the 3*l.* per Cents. for 2183*l.* 3*s.* 8*d.*, and advanced them to a Mr. *Longstaffe*, on the security of a mortgage of a freehold dwelling-house at *Northampton*, with shops and warerooms, which, it was alleged, formed an inadequate security. This bill was filed by *Mary Ann Burton Phillipson* against the trustees and all the parties who claimed to be interested in the trust-money; and it prayed a declaration, that *Gatty* and *Owen* were guilty of a breach of trust, in advancing the trust-funds on the two securities mentioned in the bill; and that they might be compelled to make good the said breaches of trust, and to invest the said sum of 2000*l.* in the purchase of 3*l.* per cent. Consols, and to re-invest the said 2347*l.* 10*s.* 2*d.* like Bank Annuities, and for the appointment of new trustees.

Where one *cestui que trust* procures the trust-money to be laid out improperly, and part of it is consequently lost, the other *cestuis que trust* are entitled, as against him, in a suit properly constituted for that purpose, to have their shares of the trust-money made good out of his share of that which is ultimately recovered. But if the bill prays relief against the trustees only, the liability of the share of that *cestui que trust* cannot be enforced against him.

1850.  
 PHILLIPSON  
 v.  
 GATTY.  
 GATTY  
 v.  
 PHILLIPSON.  
 Statement.

In February, 1845, a cross bill was filed by the trustees *Gatty and Owen* against *Richard Burton Phillipson*, *Mrs. Phillipson*, and *Mary Ann Burton Phillipson*, the Plaintiff in the former suit. That bill prayed that *Richard Burton Phillipson* might be decreed to repay to the Plaintiffs the sum of 2000*l.* advanced to him by them, and that it might be declared, that such advance was made with the consent of the Defendant *Mrs. Phillipson*, and that they were entitled to be indemnified from any money they might be decreed to pay personally in consequence of such advance, out of the life-interest of *Mrs. Phillipson* in the said sum of 2000*l.*, and all interest of *Richard Burton Phillipson* in all the trust-funds; and that it might be declared, that the said sum of 2347*l.* 10*s.* 2*d.* 3*l.* per cent. Consols was sold out, and the produce thereof invested, with the consent of all the Defendants, and that they were not liable to make good any loss in consequence of any deficiency in the security.

Both causes were heard before Vice-Chancellor *Wigram*, in November, 1848; and by the decree, which was made in the two suits, *Gatty and Owen* were ordered to pay, on or before the 25th of February then next, the sum of 2000*l.* into Court to the credit of the first-mentioned cause; and that sum was ordered to be invested in 3*l.* per cent. Annuities, and the dividends were ordered to be paid to *Gatty and Owen* during the life of *Mrs. Phillipson*, or until the further order of the Court; and it was ordered that the mortgaged premises should be sold with the approbation of the Master, and the purchase money was to be paid into the Bank to the credit of the first-mentioned cause, and invested in 3*l.* per cent. Annuities, and the dividends were ordered to be paid to *Mrs. Phillipson* during her life; and *Gatty and Owen* were thereby ordered to make up the difference between the annuities to be purchased with the money to arise from the sale of the said mortgaged premises and the 2347*l.* 10*s.* 2*d.* 3*l.* per cent. Annuities previously standing

in their names as such trustees as aforesaid. *Miss Phillipson's* costs to be paid by *Gatty* and *Owen*.

*Gatty* and *Owen* appealed from this decision; but they paid 1000*l.* into Court. Before the appeal was heard, *Mrs. Phillipson* died, and her personal representatives were made parties by bill of revivor.

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PHILLIPSON  
v.  
GATTY.  
GATTY  
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PHILLIPSON.  
Statement.

*Mr. Walker*, *Mr. Bethell*, the *Solicitor-General*, (*Sir John Romilly*), *Mr. Wood*, *Mr. Rasch*, *Mr. Giffard*, and *Mr. E. F. Smith* appeared for the different parties.

Argument.

Considerable discussion took place upon the point whether the Plaintiff, *Miss Phillipson*, had not sanctioned the loan of 2000*l.* to her brother; and as to the circumstances under which the mortgage of the house at *Northampton* had taken place.

During the argument his Lordship said, "As to the mortgage of the house at *Northampton*, I think the Plaintiff is clearly entitled to have that replaced against the trustees, because they were guilty of negligence in not making sufficient investigation as to the value and the circumstances relating to that mortgage. I also think she is entitled to have some relief against the brother, for here is a party who takes upon himself, with the sanction of the trustees but without the consent of the *cestuis que trust*, to deal with the trust fund, and to lay it out on such security as he may think expedient for the parties. But can he, against the *cestuis que trust*, if the fund turns out to be insufficient, say 'Pay me my share' he being the author of the loss—the person who has occasioned the injury? I think, therefore, that, as against the brother and as against the trustees, she is entitled to have her share made good out of the proceeds of that security, whatever it may produce; and for the same

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 PHILLIPSON  
 v.  
 GATTY.  
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 v.  
 PHILLIPSON.  
 —  
*Argument.*

reason it appears to me that she is entitled to be repaid with regard to the 2000*l*.; and I think she is entitled to be indemnified in the way of costs out of the proceeds of that mortgage."

On the question of the *Northampton* mortgage, *Stickney v. Sewell (a)*, was cited.

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 The LORD CHANCELLOR:—

*Judgment.*

I stated yesterday what my opinion was as to the rights of these parties; but I abstained from disposing of the case until I had had an opportunity of looking through the pleadings. It struck me, that there was considerable difficulty in carrying out what appeared to me to be the rights of the parties, as they now exist, in consequence of the death of the mother; and, in looking at the pleadings, that difficulty, so far from being removed, seems to me to be increased. The bill makes no case against the son at all; it merely makes him a party as being interested in the fund; it prays no relief against him, and makes no case against him, either with regard to the one security, or with regard to the other; and in that state of things, unless with the concurrence of the parties, it is very difficult to carry into effect what appears to me to be the justice of the case.

I will take the 2000*l*. first. The 2000*l*. is advanced upon a certain security not warranted by the trusts; and, therefore, it is a direct breach of trust on the part of the trustees; but one of the *cestuis que trust* is a party to that transaction, and has actually got the money. But the decree beyond all doubt, independently of the question which I expressed an opinion upon yesterday, that the sister was

(a) 1 Myl. & Cr. 8.

not barred by anything that had taken place from asserting her right against the trustees, declares the trustees are liable for that breach of trust; but then the son has the security and has the money, and he is not made a Defendant in respect of that liability at all, nor is any relief prayed against him in respect of that liability. As the decree stands, it calls upon the trustees to pay, and they have actually paid, as I understand, 1000*l.*, that is, the Plaintiff's share. But then a question is left open for litigation between the trustees and the son, and that is by no means a desirable state of things; it has answered the Plaintiff's purpose no doubt. But if the suit had been framed according to the facts as they now exist, and relief had been prayed in conformity with those facts, although the Plaintiff would have a right to disregard the investment altogether, not being according to the trusts, and to proceed against the trustees for the breach of trust, yet, inasmuch as the fund is secured, and adequately secured probably, to the extent, at least, of the Plaintiff's interest, to terminate the contest between them, they ought to realise the fund and pay the Plaintiff out of that fund; and there could be no case between the son who has got the money, and the trustees who have lent it, and no breach of trust as between those parties. That would no doubt do justice between the parties, as far as that part of the case goes; but I cannot do that upon the decree, without the concurrence of the son. If the brother would take upon himself to consider the debt of 1000*l.* as being the 1000*l.* advanced by the trustees, (which is the fact), if he would pay that 1000*l.* out of his security, the matter may be settled between the parties; and it appears to me, that is what the justice of the case requires. I think it would be the most expedient course for the parties to adopt, because it might put an end to all litigation, which litigation would only have one object, namely, realising the 1000*l.* out of that security held by the son. Now, if the

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 PHILLIPSON  
 v.  
 GATTY.  
 GATTY  
 v.  
 PHILLIPSON.  
 —  
*Judgment.*



1850.  
 PHILLIPSON  
 v.  
 GATTY.  
 GATTY  
 v.  
 PHILLIPSON.  
 —  
*Judgment.*

*Solicitor-General*, who appears on the part of the son, is prepared to take a decree with that view, that may be done.

[The *Solicitor-General* acceded on behalf of the son.]

Then it is quite clear: that puts an end to that part of the case. I think that the trustees and the son must settle it between them—it was trust money that they advanced, and they made a particular arrangement as to it. Under that arrangement, between the son and the trustees, that 1000*l.* was paid, and it should be paid to the Plaintiff; there is no reason why it should be paid into Court. That part of the case is concluded, and the Plaintiff gets back her money, and there is an end of the contest, as far as that security is concerned. I should propose then, with the *Solicitor-General's* concurrence upon that part of the case, that the son should pay the Plaintiff her share of the 2,000*l.*; and upon that payment being made, let the trustees be at liberty to apply for that money in Court to be taken out of Court. Then, with regard to the costs, I cannot make the son pay any costs. I would willingly, if I could, but there being no case made against the son, I cannot make him pay the costs of that relief which is granted with his concurrence. I think the decree should stand as against the trustees with regard to that part of the case, substituting this arrangement; the decree of the *Vice-Chancellor* is confirmed as to that.

Now, with regard to the other sum, the decree must be as I suggested it; but at present it goes further, and declares that the trustees are liable to the Plaintiff for the sum invested in the *Northampton* mortgage, whatever that sum is. As far as realising the fund goes, it is obvious that is the first thing to be done; and with regard to that, the question arises, how far the son is to be paid his share out of that mortgage. That is a question which is rather premature to dispose of now: it is a mere speculation what the security may produce,

and I do not see how I can avoid reserving that question. As to this security again, there is nothing asked against the son, and no relief prayed against him—he is merely made a party, sought to be affected as being a party to the breach of trust. Then, again, the frame of the bill (I do not say it was not properly framed under the circumstances then existing) is not exactly adapted to the state of facts as they appear now, arising from the death of the mother. Beyond all doubt, the trustees are liable independently of the question which Mr. *Bethell* argued as to the supposed acquiescence of the daughter in the investment. It was an investment not only on an inadequate security, but on a security of a character at all events which did not come within the ordinary rule of freehold property, and which might vary in value; and it was not a permanent property always likely to be of the same value. It requires very great care in ascertaining that property is ample in point of value to meet all the contingencies to which it is liable. The question here is between the trustees and the son, whether it is to come out of his share, or whether it is to be borne by them. They had not any authority to make him their agent at all, they ought to have exercised vigilance in taking care that those who were interested in the fund should have their interest properly secured; but, unless anything can be suggested now, (and that is a matter between the two Defendants), the Plaintiff ought to be reimbursed that which she is entitled to. I think that the Plaintiff has established a claim to the moiety of that fund, as well as to the moiety of the other, and she is entitled as against the trustees. Whether the son is primarily liable for his share of the mortgage-money is a question as to which I do not think the case is ripe for decision. My present impression is, unless any other mode can be suggested to answer the purpose, that you must realise the mortgage, and reserve all further directions between the parties. The trustees must pay the

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 PHILLIPSON  
 v.  
 GATTY.  
 GATTY  
 v.  
 PHILLIPSON.  
 —  
*Judgment.*

1850.  
 PHILLIPSON  
 v.  
 GATTY.  
 GATTY  
 v.  
 PHILLIPSON.  
 ———  
 Judgment.

costs of that part of the suit as well as of the other, because the son is not made a Defendant in that respect. There is no relief prayed against him. Nothing else upon that part of the case can be imputed, but negligence, to the trustees, they having acted upon representations which turned out to be unfounded; and this has led to a deficiency of the security to realise the fund, to one moiety of which the Plaintiff is entitled.

Decree.

By the Lord Chancellor's decree, it was ordered—*Mary Ann Burton Phillipson*, the Plaintiff in the first suit, and one of the Defendants in the second, and the Defendant *Richard Burton Phillipson*, by their Counsel severally consenting thereto—that *Richard Burton Phillipson* should, within six weeks from the date of the order, pay to *Mary Ann Burton Phillipson* the sum of 1000*l.*, being one moiety of the sum of 2000*l.* secured by the indenture of the 9th of November, 1837, together with interest on the said sum of 1000*l.* at the rate of 4*l.* per cent. per annum, from the 9th of February, 1849, the day of the death of the late Defendant *Eliza Partridge Burton Phillipson*: And, upon such payment of the 1000*l.*, and interest, to *Mary Ann Burton Phillipson*, *Edward Gatty* and *Edward Owen* the younger were to be at liberty to apply to the Court as they might be advised, for transfer and payment to them of the 1098*l.* 18*s.* Bank 3*l.* per cent. Annuities, standing in the name of the Accountant-General in trust in the first-mentioned cause, and the sum of 32*l.* 0*s.* 2*d.* cash remaining on the credit of the first-mentioned cause, which cash had arisen from dividends on the said Bank Annuities.

1850.

In the Matter of MARGARET STARK or FERGUSON, a Lunatic according to the Laws of Scotland.

Jan. 25th.  
July 5th.

**T**HIS was a petition presented in the matter of the lunacy and in the matter of the Act 1 & 2 Geo. IV. c. 15, intituled "An Act to authorise the Transfer of Stocks and Payment of Dividends of Lunatics residing out of England," and in the matter of the Act 11 Geo. IV. & 1 Will. IV. c. 65, intituled "An Act for consolidating and amending the Laws relating to Property belonging to Infants, Femes Covertes, Idiots, Lunatics, and Persons of unsound Mind."

An application of a *curator bonis* of a lunatic, appointed by the Court of Session in Scotland, for the transfer of stock standing in the lunatic's name in the Bank of England, (the property of the lunatic), into the curator's name, was refused; but the dividends which had then accrued thereon were ordered to be paid to him.

It was presented by *Robert Spottiswoode*, of *Edinburgh*, and it stated, that, by a decret of the Court of Session, dated the 18th day of July, 1849, the Petitioner had been appointed *curator bonis* to *Margaret Stark or Ferguson*, a widow, who was residing near *Edinburgh*. The lunatic was entitled to a sum of 4005*l.* 3*l.* per Cent. Consolidated Bank Annuities, standing in her own name in the books of the Bank of *England*. The petition prayed for an order for the transfer of these Annuities into the name of the Petitioner, as such *curator bonis*, and for the payment to him of all dividends accrued, or which might accrue, due thereon previously to the transfer.

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Mr. *John Baily* appeared in support of the petition.

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The LORD CHANCELLOR directed a reference to the Masters in Lunacy, jointly or severally, to inquire where the lunatic was then resident; and whether she had been found and declared a lunatic, or of unsound mind, according to the laws of the place where she resided; and whether her personal estate had been vested in a *curator bonis* or other person appointed for the management thereof, according to

*Judgment.*

1850.

*In re*  
**STARR.***Judgment.*

the laws of such place, within the meaning of the 11 Geo. IV. & 1 Will. IV. c. 65; and, if they found in the affirmative, then to inquire whether a sum of 4005*l.* 3*l.* per cent. Consols was then standing in her name; and whether it formed part of her personal estate; and whether the *curator bonis* had given security for the due application thereof, and was properly qualified, according to the laws of the place where she resided, to have the said stock and the dividends transferred and paid to him.

The Master found those different facts were as alleged in the petition; and that the *curator bonis* had given the usual security, by entering into a bond with a cautioner for the proper discharge of his duties. Another petition was then presented, praying that the report might be confirmed, and for the transfer and payment of the stock and the dividends.

The petition was heard before the *Lords Commissioners*, who, after referring to the case of *In re Morgan (a)*, declined to make any order for the transfer of the principal, but directed the dividends which had then accrued due on the stock to be paid to the *curator bonis*.

(a) 1 H. & T. 212.

1850.

## STURGE v. STURGE.

**T**HIS suit was instituted by an eldest son, *William Sturge*, who was entitled to real estates as tenant in tail; and the object of it was to set aside a deed of the 15th of October, 1841, by which he had conveyed those estates to his younger brothers, *Daniel Sturge*, *Tobias Walker Sturge*, and *Samuel Sturge*, he being at that time ignorant of his rights, and having received an inadequate consideration. Part of the estates had been sold, and the Plaintiff by his bill offered to confirm the sales, and prayed that he might be at liberty to take the purchase-mones in lieu of that part of the estates.

The cause was heard before the *Master of the Rolls* in May and June, 1849, and was decided in favour of the Plaintiff. The case is reported in 11 Beavan, 229.

By the decree it was declared, that the indenture of the 15th of October, 1841, so far as it was or purported to be a conveyance to *Samuel Sturge* and the Defendants *Daniel Sturge* and *Tobias Walker Sturge* ought to be set aside: and it was referred to the Master to take an account of the rents and profits of the hereditaments comprised in that indenture received by *Samuel Sturge*, deceased, and the Defendants *Daniel Sturge* and *Tobias Walker Sturge*, or any or either of them, &c., since the death of *Toby Walker Sturge*, their father. And the Plaintiff electing to confirm the sale of the portion in the pleadings called lots 6 and 8 of the same hereditaments made by *Samuel Sturge* and the Defendants *Daniel Sturge* and *Tobias Walker Sturge* to the Defendant *Earl De Grey*, it was ordered, that the Defendant *Earl De Grey* should be at liberty to pay to the Plaintiff the sum of 1208*l.* 5*s.* remaining due from the said *Earl*

*May 26th.*

By a decree at the *Rolls*, the Plaintiff had been declared entitled to real estate, which had been formerly conveyed by him to some of the Defendants, under circumstances which induced the Court to set aside the conveyance. None of the parties wished to interfere with some sales which had been since made of parts of the estate, but the amount of the purchase-money for them was ordered to be paid to the Plaintiff. The decision was appealed from, and upon motion to stay proceedings pending the appeal, upon payment into Court of the amount of the purchase-money, the Court made the order, not on account of the alleged poverty of the Plaintiff, but on the ground that the substitution of the money for that the Plaintiff

the estate was an accident arising from the sale of part of the property, and that the Plaintiff would be in the same position as if none of the estates had been sold.

1850.

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v.

STURGE.

Statement.

on account of the purchase-money of the said lots and the timber thereon, together with interest on the said sum at 4l. per cent. from the 25th of March, 1844, when the Earl entered into possession; and thereupon it was ordered, that the Plaintiff and the Defendants *Daniel Sturge* and *Tobias Walker Sturge*, and all proper parties, should convey and assure the lots to the Earl, or as he should direct, to be settled by the Master if the parties differed. And the Master was also to take an account of all sums received by *Samuel Sturge*, *Daniel Sturge*, and *Tobias Walker Sturge* from the Defendant *Thomas Buckland*, on account of the purchase-moneys of lots 2, 3, 4, 7, and 9; and it was ordered, that *Daniel Sturge* and *Tobias Walker Sturge* should pay to the Plaintiff what should be found to have been so received, with interest at 4l. per cent.; and *Thomas Buckland* was to be at liberty to pay to the Plaintiff the sum which the Master should find to have been so received, with interest; and such payment being made, the Plaintiff was to convey the lots to *Thomas Buckland*. And in default of payment by *Daniel Sturge* and *Tobias Walker Sturge* or *Thomas Buckland*, it was ordered, that *Thomas Buckland* should reconvey the said lots to the Plaintiff, and deliver up the title deeds; and that the Master should take an account of the rents received by *Thomas Buckland*, and fix an occupation rent in respect thereof. And upon such payment or reconveyance to the Plaintiff by *Thomas Buckland*, it was ordered that *Thomas Buckland* should be at liberty to prosecute the decree against *Daniel Sturge* and *Tobias Walker Sturge* in the name of the Plaintiff, in order to recover against them the amount paid by him. The decree contained similar directions as to *Joseph Mill*, the purchaser of lot 5, and as to the representatives of *John Seager Buckland*, deceased, the purchaser of two other pieces of land forming part of the hereditaments comprised in the indenture.

The brothers of the Plaintiff now applied by motion be-

fore the *Lord Chancellor* to stay any proceedings under the decree so far as it directed the payment of any money to the Plaintiff, until the appeal had been disposed of (a), the *Master of the Rolls* having previously refused a similar motion.

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v.  
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Mr. *Bethell* and Mr. *Follett*, in support of the motion before the *Lord Chancellor*, contended, that, according to the true construction of the decree, the payment of the money was not compulsory on the Appellants; and that, in default of payment, the decree gave the Plaintiff the estate itself; so that, by the payment of the money into Court, the Plaintiff would have the double security of the money and the estate. If the estate alone were conveyed to the Plaintiff, he could not make away with it pending the appeal. But if the money were paid to him, there could be no security for its return in case the appeal should succeed, inasmuch as he was in very impoverished circumstances.

*Argument.*

Mr. *Malins* and Mr. *Cairns*, in opposition to the motion, stated, that the Plaintiff's poverty had been caused by the fraud which had been practised on him by the Appellants in depriving him of his estate. The order for payment of the money was positive, so far as regarded the Appellants, although the decree gave the purchasers an opportunity of redeeming the estate in case the Appellants should fail in payment. It had in fact been arranged that the purchases of such parts of the estate as had been sold, should not be disturbed, provided the purchase-moneys were paid to the Plaintiff.

Mr. *Smythe* and Mr. *De Gex* appeared for other parties.

Mr. *Bethell*, in reply, offered to put the Plaintiff in the

(a) The motion was heard by Lord *Cottenham* at his private residence, and the Reporters are indebted to Mr. *Smythe* for his note of the proceedings.



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v.

STURGEON.

*Argument.*

same position as he would be in with respect to the estate, if the estate were now conveyed to him, and, therefore, proposed that the purchase-money should be invested at the risk of the Appellants, and that the dividends should be received by the Plaintiff, until the appeal should be decided; and it was stated that this offer had been made at the *Rolls*, though the *Master of the Rolls* had not noticed it in his judgment.

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*Judgment.*

THE LORD CHANCELLOR said, that he did not see how the offer, if accepted, could prejudice the Plaintiff. A portion of the property had been sold, and no party was willing to disturb the sale. The offer placed the two parts of the property on the same footing. He did not agree in the construction put on the decree by Mr. *Bethell*. The principle on which the Court acted in these cases was that of doing all that was necessary for the security of the property pending the appeal, and not doing more. The offer went as far as the Plaintiff could require, unless he wanted to spend the principal. This relief was quite unconnected with the circumstances of the Plaintiff. Nor did his Lordship rest it upon the construction of the decree. It was an equity arising out of the appeal, and the possibility of an alteration of the decree.

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An agreement was come to between  
the Plaintiff and the first-named De-

fendant, by which it was agreed that  
the bill should be dismissed, and that  
the Defendant should pay all costs,  
which were to be taxed, if necessary;  
and the Plaintiff agreed to move to  
dismiss, and, in default of her doing  
so, the Defendant was authorised to  
instruct Counsel for that purpose, on  
her behalf. A sum of money was paid  
in respect of the Plaintiff's costs, the  
solicitors undertaking to return a part,  
if, upon taxation, they should be found  
to have been overpaid; and an order  
was made on a motion by the Plain-  
tiff, for the dismissal of the bill, but,  
from the fault of the Plaintiff, the De-  
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GUARDIAN AD LITEM.

1. On a motion for production of documents set forth in an answer, or to pay money into Court, the Plaintiff will not be allowed to rely on an insulated passage in the answer, but must take the whole case as it is found in the answer. *Reid v. Langlois*, 59

2. The existence of an error or an inaccuracy in an answer in the description of some document not in question, where there is no ground for imputing wilful falsehood to the Defendant, is no reason for rejecting the oath of the Defendant altogether. *Ib.*

3. An arbitrator, whose award is impeached on the ground of fraud, cannot, by denying the fraud generally, protect himself from answering the interrogatories as to specific facts by which the fraud is alleged to be shewn. *Padley v. The Lincoln Waterworks Company*, 295

4. The 38th Order of August, 1841, does not protect a Defendant from answering any interrogatories from which he could not previously have protected himself from answering by demurrer. *Ib.*

5. A contractor filed a bill against a Railway Company and their engineer, whose certificates were to be conclusive as to the amount payable by the Company to the contractor. The bill alleged that the amounts mentioned in the certificates were deficient, and imputed fraud and collusion to the engineer and the Company, and, as evidence of the fraud, charged, that certain items were of a specified value:—*Held*, that the engineer could not, by denying fraud generally, protect himself by his character of arbitrator from answering as to the particular items specified. *Ib.*

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## ATTACHMENT FOR COSTS.

1. A Plaintiff was arrested upon a writ of attachment for non-payment of costs; but, it being ascertained that he was privileged at the time of his arrest, he was discharged out of custody, by consent:—*Held*, that the Defendant was not precluded from issuing a second writ of attachment in respect of the same costs. *Andrews v. Walton*, 154

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## BANKRUPT.

In the case of a fiat issued previously to the stat. 12 & 13 Vict. c. 106, and in which the proceedings had not been completed, the Lord Chancellor ordered the petitioning creditor's affidavit, and the petition for the fiat, to be produced for the purpose of being inrolled and sealed, with a view to their production on the trial of an action in

## CONSTRUCTION.

which the validity of the fiat was to be decided. *In re Bishop*, 220

## BOND.

The obligor in a bond for 1,000*l.*, and his partner in business, became insolvent, and they made a composition with their creditors, which the obligee in the bond guaranteed, and he then promised the obligor to relinquish his debt on the bond. The compromise with the creditors could not have been carried out if the obligee had attempted to enforce his bond:—*Held*, that the transaction between the obligor and obligee amounted to such a contract as would have the effect of giving time to the principal, and that, consequently, the sureties in the bond were discharged. *Cross v. Sprigg*, 233

## CHARITY.

In 1699, a lease of charity land was granted for 999 years, at a rent very little more than had for some time been received for it. The lessee covenanted to build upon the land. That lease was in 1849 set aside as to a part of the land comprised in it, on an information filed against the assignee of that part only; and he was held not to be entitled to any allowance in respect of the building which had been erected upon the land. *Attorney-General v. Pilgrim*, 186

## COMMISSIONERS.

*See INJUNCTION*, 4.

## CONDUCT OF SUIT.

Where the prosecution of an administration suit had been neglected for several years, the conduct of it was given to parties who had been proved to be creditors, *until further order*. *Beale v. Symonds*, 374

## CONSTRUCTION.

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## CONTRACT.

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## CONTRACT.

*See RAILWAY COMPANY*, 12, 13.

1. A *Calcutta* firm, by a letter, dated in January, and received in *London* on the 11th of March, 1841, directed their *London* correspondents to hold a sum of money (equal to a lac of rupees at the current rate of exchange), payable on the 19th of November following, out of remittances and consignments on the general account, at the disposal of a creditor of the *Calcutta* firm in *Liverpool*. The *Calcutta* house, at the same time, acquainted the *Liverpool* house of the directions which had been given. The *London* house informed the *Liverpool* house that they had received and registered the order; and, after stating that they were in advance of the *Calcutta* house, and declining to accept bills for any part of the amount, said, that if remittances should come forward to enable them to meet the wishes of the *Calcutta* house, they would lose no time in advising the *Liverpool* house. The *London* house also, in acknowledging to the *Calcutta* house the receipt of the order, said, that the state of their account did not then warrant them in meeting the requisition, but they would meet it, if in a position to do so before November. The *Calcutta* house revoked the order, by a letter of January, 1842, received by the *London* house on the 12th of March, 1842. The Court below having directed an account to be taken in favour of the *Liverpool* house as against the *London* house, the Lord Chancellor on appeal directed the cause to stand over, with liberty for the Plaintiff to bring such action as he might be advised, to establish his right at law; and the Plaintiff subsequently failing in an action at law the bill was dismissed. *Malcolm v. Scott*, 440

2. When mercantile correspondence respecting the appropriation of funds in the hands of a consignee belonging

to the debtor, does not constitute a legal contract on the part of the consignee to apply the funds in payment of the debt of the creditor,—whether the creditor may still support a claim to the funds on the ground of there being an equitable assignment—*Quære?* Ib.

### CONTRACTOR.

See RAILWAY COMPANY, 7, 8.

### CONTRIBUTORY.

1. By a Company's deed it was provided, that every person who, being the executor of any deceased proprietor, should not, at the time of the shares vesting in him in such capacity, be a recognised proprietor in respect of any other shares, should, as to all duties, obligations, &c., upon or against him in respect of such shares, become a proprietor from the time of the shares becoming so vested in him; but, as to profits, &c., no such person should be considered a proprietor in respect of the same until he should have executed or acceded to the deed:—*Held*, that the receipt of dividends by the executor of a deceased proprietor did not create any personal liability in the executor. *In re The St. George Steam Packet Company, Ex parte Doyle*, 221

2. An association was formed for the purpose of making a railway, and was provisionally registered. A. allowed his name to be inserted in the list of the provisional committee, but afterward directed it to be withdrawn, and he declined to take any shares. The provisional committee appointed a managing committee, and certain expenses were incurred, and the scheme was ultimately abandoned. A. then, for the first time, attended some meetings of the provisional committee, and signed an agreement, together with other members of the provisional committee, to bear equally any payments which any of them might be

subjected to on account of the expenses and liabilities of the Company. A. paid several sums of money on account of his contribution:—*Held*, that the association was sufficiently formed to be a Company within the meaning of the Winding-up Act, and that the name of A. was properly inserted in the list of contributories. *In re The Direct Exeter, Plymouth, and Devonport Railway Company, Ex parte Besley*, 375

3. A.'s name was, with his consent, placed on a provisional committee, and inserted in the usual advertisements. He never acted as a member of the committee, nor did any act except authorising his name to be put on the list:—*Held*, that he was not liable as a contributory. *In re The Wolverhampton, Chester, and Birkenhead Junction Railway Company, Ex parte Cottle*, 382

4. The deed of settlement of a Company purported to be made between persons referred to and described as being named in a schedule, of the first part, and persons named and described, of the second and third parts. There was no schedule to the deed, which, however, was executed by numerous persons besides those of the second and third parts. One of the clauses authorised the directors to declare forfeited the shares of any party to the deed who did not execute it; and another clause directed that, on a transfer, the transferee should take on himself the antecedent liability of the transferor. An allottee of shares paid his deposit and some calls, but did not execute the deed. The directors declared his shares forfeited, and carried them to the Company's share account, and he submitted to the forfeiture. On the affairs of the Company being, several years afterwards, wound up, under the Joint-stock Companies Winding-up Act, the Master excluded the allottee from the list of "contributories," holding that he was

virtually a party to the deed, so as to enable the directors to forfeit his shares under its provisions; and that the forfeiture relieved him from responsibility in respect of losses accruing before it was declared. The Court, on appeal, affirmed the decision, holding that he had been connected with the Company merely by contract, which might be put an end to by the consent of both parties. *In re Kollmann's Railway Locomotive and Carriage Improvement Company, Ex parte Beresford*, 388

5. A. consented that his name should be placed on a provisional committee of a Railway Company, subject to his approval of the plans and course of the line, and so that he should be held free from all liabilities. His name was put on the list, and he attended two meetings of the provisional committee, at the latter of which a managing committee was appointed; but A. left the meeting before the resolution was passed. His name was afterwards withdrawn at his request:—*Held*, that, under these circumstances, and independently of the stipulation in his original consent, he was not liable as a contributory; and that the fact of his having contributed 65*l.* under protest, when threatened with actions by creditors of the Company, did not vary the case. *In re the Direct Exeter, Plymouth, and Devonport Railway Company, Ex parte Roberts*, 391

6. The deed of settlement of a Joint-stock Company required every transfer of shares to be registered, and the form of the transfer was adapted for execution both by transferror and by transferee. A shareholder sold his shares, and executed a transfer, which, however, was never executed by the transferee, the purchase having been made by a father for his son, but the son declining to accept the shares. The transfer was duly registered, and the Company addressed notices and circulars to the son at the residence of the father:—*Held*, that the seller

had not effectually transferred his shares so as to have got rid of his liability as a shareholder, and that he was properly placed upon the list of contributories, upon the affairs of the Company being wound up under the Winding-up Act. *In re the St. George Steam Packet Company, Ex parte Hennessy*, 395

## COPYRIGHT.

Where an *ex parte* injunction had been obtained, without stating to the Court that there was a question as to the construction of an Act of Parliament upon which the Plaintiffs' right might depend, the injunction was dissolved, although it did not appear that the Plaintiffs were aware, when they applied for the injunction, that any such question existed. *Dalglish v. Jarvie*, 437

## CORPORATION.

*See* RE-INVESTMENT ON REAL ESTATE.

## COSTS.

*See* ATTACHMENT FOR COSTS.

## ENQUIRY.

INJUNCTION, 1.

LUNACY, 4.

PARTNERSHIP IN LAND.

RE-INVESTMENT ON REAL ESTATE.

TRUSTEES RELIEF ACT, 4.

1. The principle of the rule, that the *Attorney-General* never receives or pays costs, will for the future be modified thus—viz. that the *Attorney-General* is not to receive costs in a contest in which he could have been called upon to pay costs, had he been a private individual; but the rule is not to be without exception. *The Attorney-General v. The Corporation of London*, 1

2. The rule of the Court as to the costs of an appeal is, that when the case has been once decided, and the decision is quarrelled with, but found correct on appeal, the dissatisfied party

must pay the costs of the appeal.  
*Lassence v. Tierney*, 115

3. Where a decree which is appealed from is affirmed on the chief points, but is varied in immaterial particulars only, the Appellants will not be exempted from paying the costs of the appeal. *Purchase v. Shallis*, 354

### CREDITORS' SUIT.

See CONDUCT OF SUIT.  
EXAMINATION.

### CROWN.

The object of the stat. 21 Jac. 1, c. 14, was to place a party contesting with the Crown in the same situation as a party contesting with any other Plaintiff. *Attorney-General v. The Corporation of London*, 1

### CURATOR BONIS.

See LUNACY, 6.

### DELAY.

Where a party files a bill seven months after action commenced against him, to restrain proceedings therein, and obtains the common injunction, and afterwards is guilty of great delay in the suit, the Court will decline granting the Plaintiff any time whatever by postponement of the trial of the action. *Reid v. Langlois*, 59

### DEMURRER.

See RAILWAY COMPANY, 1, 7, 8, 12.

1. On the formation of a Company, their deed of settlement contained certain rules and regulations for the transfer of shares, one of which was, that every erasure or other alteration which should have been made by the directors in the share register book should, as between the Company and the last proprietor, be conclusive on such proprietor as to the title to the shares. There were also various provisions in the deed, framed for the purpose of preventing any fraud or improper

transfer of shares, which it was the duty of the officer of the Company to see carried into effect. *C.*, a proprietor of shares in the Company, in the character of an executor, deposited the same with the secretary, for the purpose of his registering them in *C.*'s name; the secretary, instead of so doing, sold the shares to *B.*, and received the purchase-money, and procured the erasure required by the deed to be made in the register book of the Company, but the other regulations required by the deed to be observed on a transfer of shares were not complied with. The secretary having absconded, *C.* filed his bill against the chairman and secretary for the time being, pursuant to a clause in the deed, providing that those parties should sue and be sued on behalf of the Company, seeking compensation against the Company in the nature of damages, in respect of the loss sustained by the Plaintiff, and a declaration of the Court to that effect. Neither *B.* nor the absconding secretary were made Defendants:—*Held*, on demurrer, filed by the two Defendants for want of equity and want of parties, that the demurrer was good for want of equity, on the ground that the transfer, not being in accordance with the requisitions of the deed of settlement, did not bind the Company. *Duncan v. Luntley*, 78

2. *Semble*, that *B.* was not a necessary party, the bill not questioning his interest in the shares. Leave was given to the Plaintiff, under the circumstances of the case, to amend the bill. *Id.*

### DEPOSITIONS DE BENE ESSE.

1. Where a person whose depositions have been taken *de bene esse* might have been, but was not, examined between the time when the cause was at issue and the time when publication passed, publication of these depositions will not be allowed. *Forsyth v. Ellice*, 424

2. In a bill for an account, depositions were taken *de bene esse* as to the correctness of entries in partnership books, but they were not published before the decree. An application to have them published afterward, in order that they might be used in the Master's Office, was refused. *Ib.*

## DESIGNS.

See COPYRIGHT.

Whether, under the Designs Copyright Act (5 & 6 Vict. c. 100) the exhibition of a pattern on paper, before it is applied to any of the fabrics mentioned in the Act, and registered, is a publication of it, so as to deprive the proprietor of all right to protection for that particular pattern—*quære*.  
*Dalglish v. Jarvie*, 437

## DIRECTORS.

See JOINT STOCK COMPANY.

## DISCHARGE OF PRISONER.

See LORD CHANCELLOR.

## DISCOVERY.

1. An information by the *Attorney-General*,—after stating the title of the Crown to the bed of the river *Thames*, and to the land and soil under all navigable rivers; that her Majesty was, and had from time immemorial been, seised of the port and haven of *London* and of the river *Thames*, the same being an arm of the sea, into which the sea always flowed and reflowed; that the river had always been navigable; that the Defendants had at all times been conservators of the river, and claimed the freehold of the soil, and, under that title, had made certain grants, which were pretended to be supported by their claim to the freehold, which the information alleged to be bad, inasmuch as the Defendants had no freehold; that such grants were injurious to the navigation of the river, and therefore obnoxious as nuisances,

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even supposing that the Defendants had any such freehold; that it would be the Defendants' duty, as conservators of the river, not to permit encroachments, which, it was alleged by the information, were injurious to its navigation; that the Defendants pretended that they had a grant of the bed of the river from the Crown, and that they had some charters, not containing the grant, but recognising the grant,—charged—that there was no such grant of the freehold in any charter from the Crown to the Defendants, and that there was no charter recognising such grant. Other pretences of title by the Defendants were stated in the information, and negatived by it; and it concluded with the charge that the Defendants had in their possession &c., divers documents relating to the matters aforesaid. The Defendants, by their answer, denied the title of the Crown to the bed of the river *Thames*, and left it as a matter of law, whether any such general right existed in the Crown as was claimed by the information; and they met the fact of title of the Crown to the land and soil of the river by a direct negative, and insisted that the Crown was not, but that the Defendants were, entitled thereto. The Defendants admitted that they had held the office of conservators:—*Held*, that the answer was insufficient. *Attorney-General v. The Corporation of London*, 1

2. A Plaintiff is entitled to a discovery from the Defendant, not only of that which constitutes his own original title, and of what the Defendant's case is, [though not to the discovery of the evidence by which that defence is intended to be supported], but also to a discovery to enable him to repel a defence which he expects will be set up. *Ib.*

## DISMISSAL OF BILL.

An agreement was come to between the Plaintiff and the first-named De-

K K

L. C.



fendant, by which it was agreed, that the bill should be dismissed, and that the Defendant should pay all costs, which were to be taxed, if necessary; and the Plaintiff agreed to move to dismiss, and, in default of her doing so, the Defendant was authorised to instruct Counsel for that purpose, on her behalf. A sum of money was paid in respect of the Plaintiff's costs, the solicitors undertaking to return a part, if, upon taxation, they should be found to have been overpaid; and an order was made on a motion by the Plaintiff, for the dismissal of the bill, but from the fault of the Plaintiff, the Defendant could not get it passed and entered. Upon motion by the Defendant three years afterwards, an order was made as against the Plaintiff and her solicitors, to leave with the Registrar the original order and the Counsel's brief on the motion. *Robinson v. Manuelle*, 402

## ELECTION.

1. A testator devised to the Plaintiff all his freehold house at *T.*, then on lease to *T. U.*, and he bequeathed all his undivided moiety in a leasehold house at *P.* to his niece and heiress-at-law. The testator had no house at *T.*, but he and his niece were entitled, in undivided moieties, to two houses at *T.*:—*Held*, that the language of the will shewed an intention to devise the entirety of the house, and that, consequently, a case of election arose against the niece. *Padbury v. Clark*, 341

2. The rents of the leasehold house had been received by the father of the niece, who was an infant, until some years after the lease expired, and on her attaining twenty-one he accounted to her for the rents. She shortly afterward made a mortgage of the entirety of the leasehold house, and of her moiety of the freeholds at *T.*, and upon her marriage executed a

settlement which comprised the same property. A lease was afterward executed of the freeholds, in which the Plaintiff concurred with the testator's niece and the trustees of her settlement:—*Held*, that, under the circumstances, no election had already been made by the niece; and she, electing at the hearing to take against the will, was decreed to account for the rents received on her account in respect of the leaseholds. *Ib.*

## ENQUIRY.

1. *W. S.* by will gave all his real estates unto and to the use of *W. T.*, his heirs and assigns, upon trust, out of the rents to pay to *M. S.*, during her life, an annuity of 150*l.*, and to apply the surplus rents, after payment of the annuity, and such other charges and expenses as thereinafter mentioned, unto the testator's daughter *C. N.*, wife of *B. N.*, during the life of *M. S.*; and, after the decease of *M. S.*, the testator directed that the estates should remain unto *W. T.*, his heirs and assigns, to the use of *C. N.*, for her life, with remainder to the use of *W. T.*, his heirs and assigns, during *C. N.*'s life, in trust to preserve, &c.; and after the decease of *C. N.*, to the use of *B. N.* for life, with remainder to the use of *W. T.*, his heirs and assigns, during the life of *B. N.*, in trust &c.; and after the decease of *B. N.*, in case he should survive *C. N.*, to the use of all the children of the body of *C. N.* to be begotten, as tenants in common: and there was a proviso, that, in case *B. N.*, and *C.* his wife, or the survivor, should desire a sale of the estates, it should be lawful for *W. T.*, his heirs or assigns, to sell the same, with the consent of *B. N.* and *C.* his wife, and sign and give receipts for the purchase-mones, which were to be effectual discharges to the purchasers. The will contained a direction to lay out the sale monies in the purchase of other

hereditaments, or upon good security at interest in the name of *W. T.*; and the hereditaments to be purchased were directed to be conveyed to *W. T.*, his heirs and assigns, to the uses before mentioned; the interest of the sale monies was directed to be paid to the parties entitled to the rents, and the principal money, in case of no purchase being made, was directed to be divided amongst *C. N.*'s children equally at twenty-one. After the death of *W. T.*, *G. T.*, the sole devisee of his estates, subject to a gross payment of 50*l.* thereout, joined with *B. N.* and *C.* his wife in the sale and conveyance of *W. S.*'s estates to a purchaser thereof, and *B. N.* was allowed to receive the purchase-money, and gave to *G. T.* a bond of indemnity to save her harmless in respect of such receipt. *C. N.* survived her husband *B. N.* several years, and also *G. T.*, who by her will appointed *C. S.* her executrix. The executors of *C. N.* and the assignees of her life-interest obtained a decree for an account against *C. S.*, the legal personal representative of *G. T.*, to the extent of *C. N.*'s life-interest in the principal of the sale monies:—*Held*, that, if an inquiry had not been already directed to that effect in a previous suit instituted for administering *B. N.*'s estate, an inquiry would have been directed as against the *cestui que trust* under *B. N.*'s will, whether the sale monies received by *B. N.* were or not laid out by him in the purchase of other estates, there being an allegation to that effect in the answer of *C. S.* *Rackham v. Siddall*, 44

2. *Held* also, that the Defendants, the parties in remainder under the will of *W. S.*, having adopted and endeavoured to reap the benefit of the present suit, and taking nothing from it, were not entitled to their costs. *Id.*

## EQUITABLE ASSIGNMENT.

See CONTRACT.

## EXAMINATION.

Where, by the decree, the Plaintiff was declared a specialty creditor of the testator, and a reference was directed, to take an account of what was due to him, accompanied by the ordinary directions contained in a creditors' suit, the Defendant, although executrix and universal legatee of the testator, was not entitled, under the decree, to exhibit interrogatories before the Master, for the examination of the Plaintiff, who was the only creditor of the testator, as to parts of the testator's personal estate which had come to his possession; but liberty was given to the Defendant to raise the case for further inquiry, by petition to be brought on, when the other exceptions to the report, which had not been discussed, were set down for hearing. *Caton v. Rideout*, 33

## EXECUTOR.

See CONTRIBUTORY, 1.

## FRAUD.

*P. A. L.* was engaged in a speculation in *New South Wales*, in partnership with *M.* and three other persons, *M.* being interested as executor of a deceased partner. *M.* and one *F.* were the *London* agents of the concern. In 1830, *P. A. L.* became bankrupt, being at the time indebted to the partnership concern for advances made in respect of his share. He disputed the commission, and the concern being brought into a state of great embarrassment and difficulty by his circumstances and conduct, a deed was executed in August, 1829, whereby *P. A. L.* assigned his share to *M.* and *F.*, in trust to secure the amount due from him to the concern, and subject thereto, in trust for *P. A. L.*; and *P. A. L.* covenanted not to interfere in the control or management of the concern. In December, 1831, *P. A. L.* (his commission still existing)

agreed, with the assistance of solicitors acting on his behalf, to release his interest to his partners, in consideration of 250*l.*; but the completion of this contract was deferred, by reason of the *superseas* not having been obtained. *P. A. L.* afterwards received 50*l.* on account of the 250*l.*, and otherwise recognised the agreement. The agreement was, on the 2nd of May, 1836, and at his request, completed, without the intervention of any professional person on his behalf, and no further accounts and explanation appeared to have been furnished him. In May, 1839, having obtained an assignment of his interest from his assignees, he filed a bill to set aside the deeds of August, 1829, and May, 1836, on the grounds of fraud, misrepresentation, concealment, and the gross inadequacy of the consideration; but the Court dismissed the bill with costs,—holding, that the transactions were in themselves unobjectionable, and were dealings with the property, which were not connected with any trusts between the parties, and were not to be regarded as a purchase of trust-property by trustees for their own advantage and consequently open to be impeached in a Court of equity. *Knight v. Marjoribanks*, 308

## FRAUD ON PARLIAMENT.

See RAILWAY COMPANY, 9, 10, 11.

## GENERAL MEETING.

See JOINT-STOCK COMPANY.

## GENERAL RELEASE.

The husband and administrator of a party, who had been entitled for life to the income arising from a share of a testator's residuary estate, and who was himself interested in part of the residue, executed, for valuable consideration, to a party who had become entitled to a portion of the principal, an assignment of all his interest in the testator's estate, mentioning out-

standing debts in India generally. And the deed contained mutual general releases. Both of the parties knew that part of the trust property was out-standing; but it was afterward discovered, that a sum was due from the executor, in respect of assets which he had misapplied to his own use, and of which neither of the parties to the deed had any knowledge at the time of its execution. The administrator claimed the arrears of interest which accrued due thereon in the lifetime of the party entitled for life:—*Held*, that, as the general words of the assignment were sufficient to pass all the interest of the administrator in the arrears, his claim could not be sustained. *Howkins v. Jackson*, 301

## GUARDIAN AD LITEM.

Where Defendants had taken no proceedings until the last day allowed for putting in their answer, when they obtained an order for further time, but afterward obtained the appointment of a guardian *ad litem*, on the ground that they were of unsound mind, the Court refused an application of the Plaintiff, under the 32nd Order of May, 1845, to appoint a guardian for them, on the ground that they were in default for want of answer. *Saunders v. Walter*, 199

## HUSBAND AND WIFE.

1. The Plaintiff filed his bill against the Defendant, the sole executrix of her deceased husband *John Rideout*. By the decree, the Plaintiff was declared a specialty creditor of the testator, and a reference was directed to take an account of what was due to him, accompanied by the ordinary directions contained in a creditors' suit. The Defendant, under a settlement executed on her marriage with the testator, was entitled, for her separate use, to the dividends on a sum of 3*l.* per cent. Consols. The Defendant's trustees, through the medium of their

bankers, received the dividends as the same accrued due, for a number of years, down to the date of the husband's death, and paid the same from time to time to the husband's bankers, to his account, the wife never asserting her right to receive the separate benefit thereof. The Master, by his report, found that the Defendant had received a considerable sum of money, part of the testator's personal estate, including a sum of \$551., the amount of the balance in the hands of the testator's bankers at the time of his decease:—*Held*, notwithstanding the testator was one of the three trustees under the wife's settlement, that the balance was part of the testator's personal estate, and not the separate estate of the Defendant. *Caton v. Rideout*, 33

2. By parol agreement, before marriage, between the intended husband and wife, it was arranged that he should receive for his own absolute use a certain sum of money, part of the intended wife's property, and that the rest of her property should be enjoyed by her, and settled to her sole and separate use. The intended husband duly received the money, but no settlement was made on the intended wife. After the marriage, the wife, by her next friend, filed her bill, stating the above facts, and praying a declaration that she was entitled to the property for her separate use, and that the same might be conveyed and transferred accordingly. The husband by his answer admitted the ante-nuptial arrangement. Subsequently to the filing of the bill, a deed was prepared, to which the husband and wife were parties, which was recited to have been made in pursuance of the ante-nuptial arrangement, and by which the husband assigned and conveyed to a trustee all his right and interest in the wife's property for her sole and separate use, and empowering her to dispose thereof by deed or will,

as if she had not been a married woman. The deed was not acknowledged by the wife pursuant to the provisions of the Statute. She afterwards died, having previously made a will, whereby she gave the property to her husband and other parties. The husband and trustee then filed their bill of revivor and supplement against the heir-at-law of the deceased wife and other parties, stating the above facts, and praying that the ante-nuptial arrangement might be decreed to be carried into effect, and that the heir-at-law might be decreed to convey all his estate and interest in her real estate, in conformity with the will, and (if necessary) that the want of an acknowledgment of the deed might be supplied by the Court, and that the will might be declared a good execution of the power given to the wife by the deed. *Held*, first, that, under the circumstances stated, there was no case proved against the heir-at-law; secondly, that a parol agreement entered into before marriage, and nothing following thereon except the marriage, could not, on the true construction of the Statute of Frauds, be carried into effect by the Court; and, thirdly, that the want of an acknowledgment of a deed would not be supplied by the Court, inasmuch as such a proceeding would destroy the guard which the law threw around married women for their protection, against the influence of their husbands. *Lassence v. Tierney*, 115

## INJUNCTION.

See DELAY.

RAILWAY COMPANY.

1. A bill having been filed to restrain the invasion of a patent right, alleged by the Plaintiffs to be their property, the Plaintiffs moved for an injunction, and obtained an order of the Court awarding the injunction, notwithstanding the opposition there-

to of the Defendants. The Plaintiffs failed to establish their right in an action at law, directed by the Court to be brought by the Plaintiffs in equity against the Defendants, and the bill was eventually dismissed with costs, for want of prosecution:—*Held*, that the Defendants were entitled to their costs of resisting the motion for the injunction. *Stevens v. Keating*, 176

2. The Court of Chancery will, in proper cases, grant an injunction to restrain parties from applying to Parliament for a private Act, or an Act respecting property; but it will not do so merely upon the ground that such Act would interfere with existing rights, whether they exist by the tenure of property or by virtue of contract. *Heathcote v. The North Staffordshire Railway Company*, 332

3. A landowner withdrew his opposition to a bill before Parliament, on the faith of an agreement with the Railway Company, that they should in the next session of Parliament apply for an Act, authorising the formation of a Branch Railway to certain works belonging to such landowner. The Company obtained an Act in the following session, but afterward gave notice of their intention to apply for another Act, authorising them to abandon that Branch:—*Held*, that there was no ground for granting an injunction to restrain the Company from applying for such an Act. *Id.*

4. By a local Act of Parliament commissioners were appointed to construct such reservoirs and other works as might be necessary for supplying a town with water, and to do all things necessary for that purpose; and they were authorised to levy rates for the purposes of that Act. The supply of water was found insufficient, and the Commissioners were desirous of bringing water from other places, so as effectually to carry out the objects of the Act:—*Held*, that they were not authorised in applying any of the mo-

nies received from such rates, in payment of the expenses of making application to Parliament for another Act to extend their powers: and an injunction was granted to restrain them from so doing. *The Attorney-General v. Andrews*, 431

5. Where an *ex parte* injunction had been obtained, without stating to the Court that there was a question as to the construction of an Act of Parliament upon which the Plaintiffs' right might depend, the injunction was dissolved, although it did not appear that the Plaintiffs were aware, when they applied for the injunction, that any such question existed. *Dalglish v. Jarvie*, 437

6. Although the Court will interfere by injunction, in proper cases, to restrain a Company from constructing a small portion only of their works, with a view of abandoning the remainder, yet where such an intention had been known to the shareholders, or they had had opportunity of knowing it many months before the filing of a bill to prevent such proceeding, and had made no application to the Court, such acquiescence on the part of the shareholders was held to have created a counter equity; and the Court refused to grant an injunction for that purpose. *Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 450

#### INTEREST OF JUDGE.

*See JUDGE.*

#### ISSUE DEVISAVIT VEL NON.

A testator, seised of large real estates, made a will, by which he gave certain benefits to his daughter, who was his heir and a married lady; and declared, that, if she or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, by any possi-

ble result of which any estate or interest could be in any way attainable by his daughter or her husband of larger extent than was intended for her by the will, and she and her husband should not formally disavow, stay, or resist such proceedings to the best of their ability, then he revoked the benefits given to her. The testator was the subject of a commission of lunacy when he made his will, and continued so until his death. In a suit by the trustees of the will, to establish it, the Plaintiffs proved that the testator was of sound mind when he made his will; and there was no evidence to the contrary. Nevertheless, the Court directed an issue *devise vel non* to be tried, the Plaintiffs to be Plaintiffs at law, and a gentleman, with whom the husband had entered into a covenant during the infancy of his wife and in the lifetime of her father, to make a settlement of any estates that she might thereafter become entitled to, to be the Defendant at law. *Cooke v. Cholmondeley*, 162

#### JOINT-STOCK COMPANIES WINDING UP ACTS.

See CONTRIBUTORY.

#### JOINT-STOCK COMPANY.

See DEMURRE.

1. Where the deed of settlement of a Company authorises a general meeting of shareholders to remove a director for any reasonable cause, he may be removed for any cause which, in the opinion of the shareholders duly assembled, shall be deemed reasonable, without its being incumbent upon them to prove the reasonableness of the cause in any Court of justice. *Inderwick v. Snell*, 412

2. A meeting was called by advertisement, stating that the object of it was, to remove directors, but not stating any alleged grounds for their removal; and also mentioning several

other objects of the meeting:—*Held*, that it was regularly convened, and was competent to remove the directors. *Id.*

#### JUDGE.

An incorporated trading Company filed a bill against the lord of a manor, and obtained an injunction against him, to restrain him from taking possession of certain land to which he had established his right at law. A motion to dissolve the injunction was afterwards refused by the *Lord Chancellor*. At the hearing of the cause, the injunction was made perpetual, and a decree was made in favour of the Plaintiffs, which decree was afterwards affirmed by the *Lord Chancellor*, on appeal. The Defendant was committed for a breach of the injunction. An application to discharge the order for committal, and the decree on the re-hearing, and to take the bill off the file, on the ground that the *Lord Chancellor* was a shareholder in the Company, was refused, with costs. *The Grand Junction Canal Company v. Dimes*, 92

#### JURISDICTION.

Where land is taken by a Railway Company, not under their compulsory powers, but by private contract, the jurisdiction of the Court of Chancery to secure to the vendor the easements he contracted for, is not ousted by the provisions of the Railway Acts. *Sanderson v. The Cockermouth and Workington Railway Company*, 327

#### LEGACY.

1. If a testator leave a legacy absolutely, as regards his estate, but restrains the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee, on failure of such objects the absolute gift prevails; but if there be no absolute gift as between the legatee and the estate, but particular modes of enjoyment are

prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having, in such event, been given away from it. *Lassence v. Tierney*, 115

2. The intention of the testator, that the gift should be absolute as between the legatee and the estate, is, in all cases of construction, to be collected from the terms of the will, and not from an expression or words which, standing alone, would constitute an absolute gift. *Ib.*

3. A testator bequeathed "an annuity of 21*l.* per annum, which I purchased from *J. G.*" The testator never had an annuity of that amount, but he had purchased from *J. G.*, for 300*l.*, an annuity of 46*l.* per annum, and had insured the life of *J. G.* at an annual premium of 25*l.*, and had made an entry in his books of "300*l.* lent to *J. G.* at 7 per cent., 21*l.*: 25*l.* premium on policy of insurance for 300*l.*."—*Held*, that the whole annuity of 46*l.* passed to the legatee. *Purchase v. Shallis*, 354

### LORD CHANCELLOR.

*See* JUDGE.

The *Lord Chancellor* has jurisdiction, as the Judge of one of the superior Courts of record at *Westminster*, to discharge a prisoner under the 48 Geo. III. c. 123. *Lister v. Lister*, 174

### LUNACY.

*See* ISSUE DEVIAMIT VEL NON.

1. *Seemle*, the order of the *Lord Chancellor*, under the 5th sect. of the Stat. 1 Will. IV. c. 60, confers no title on a purchaser of mortgaged hereditaments under a power of sale, where the purchase-money exceeds 700*l.*, although the total amount due and payable beneficially to the estate of the lunatic (not found so by inquiry) is less than that sum; but the *Lord Chancellor*, on the petition of the receiver of the lunatic's estate,

(the purchaser consenting to take the title), directed a reference to the Master, to inquire whether the lunatic was a mortgagee, what sum was due on the mortgage, whether the sale that had been made was a proper one, and what sum would be coming to the lunatic mortgagee on its completion. *In re Sandford*, 137

2. Where the protector of a settlement resides in *Ireland* and is a lunatic, the *Lord Chancellor of England*, and not the *Lord Chancellor of Ireland*, is authorised by the 3 & 4 Will. IV. c. 74, to consent, in his stead, to the barring of the estate tail and the remainders over in hereditaments which are situate in *Wales*—*Seemle. In re Graydon*, 182

3. Where a proposed settlement on the marriage of the only child of a lunatic tenant for life would have the effect of excluding the brother of the lunatic, and of enabling her to give the hereditaments to her husband in preference to her issue, the *Lord Chancellor*, as protector of the settlement, refused to give his consent to such an arrangement. *Ib.*

4. In the case of a petition by a mortgagor, seeking to confirm the Master's report as to a lunatic mortgagee, and a re-conveyance of the mortgaged premises, and appointment of new trustees, there being no proof that the mortgagor was aware of the lunatic being a trustee, the costs of and incidental to the application were ordered to be paid out of the trust estate. *In re Townsend*, 185

5. Where the income of a lunatic amounted to 21*l.* 16*s.* 11*d.* only, the *Lord Chancellor* refused to allow a sum of 60*l.* per annum for maintenance, but allowed part of the principal of her property to be sold to purchase an annuity of 30*l.* per annum. *In re Fisher*, 449

6. An application of a *curator bonis* of a lunatic, appointed by the Court of Session in *Scotland*, for the trans-

fer of stock standing in the lunatic's name in the Bank of *England* (the property of the lunatic), into the curator's name, was refused; but the dividends which had then accrued thereon were ordered to be paid to him. *In re Stark or Ferguson*, 467

### MERCANTILE CORRESPONDENCE.

See CONTRACT.

### MORTGAGE.

See LUNACY, 1, 4.

### PARLIAMENT.

See INJUNCTION, 4.

RAILWAY COMPANY, 17.

### PARTIES.

See DEMURRER.

RAILWAY COMPANY, 4, 5, 6, 21.

### PARTNERSHIP IN LAND.

In the month of May, 1843, a parol agreement was entered into between *A.* and *B.* for a partnership between them as to certain land intended to be used for building purposes, and a lease of it was afterwards executed by the lessor to *B.* only, the lessor declining to grant a lease to two persons. Certain acts of ownership were exercised by *A.* shortly after the agreement was entered into; but, afterwards, *A.* permitted *B.* to lay out his money in the erection of buildings on the land, without interfering therewith. After a lapse of eighteen months, *A.*'s solicitor applied to *B.* to perform the agreement, which *B.* repudiated; six months afterwards, *A.* filed his bill against *B.*, seeking specific performance of the agreement:—*Held*, that the circumstances were such as to exclude *A.* from insisting on the specific performance of the agreement by *B.*; but, in the order dismissing the bill with costs, direc-

tions were given to the Master to disallow the Defendant the costs occasioned by his setting up the Statute of Frauds, and disputing the parol agreement and part performance thereof. *Cowell v. Watts*, 224

### PLEA.

After bill filed for an account, and appearance entered by two of the Defendants, who were in partnership as solicitors, one of them took the benefit of the Insolvent Debtors Acts, and the provisional assignee of the Insolvent Debtors Court was, by order of that Court, appointed the assignee of his estate and effects. Plea filed to the bill, stating that fact, and that the provisional assignee ought to be made a party to the suit, was allowed. *Sergrove v. Mayhew*, 218

### PLEADING.

See TRUSTER.

### PRACTICE.

See ANSWER.

COSTS.

CROWN.

DEMURRER.

DEPOSITIONS DE BENE ESSE.

DISCOVERY.

ENQUIRY.

EXAMINATION.

GUARDIAN AD LITEM.

INJUNCTION.

PLEA.

PRODUCTION OF DOCUMENTS.

RECEIVER PENDENTE LITE.

REFERENCE.

### PREMIUM ON ARTICLED CLERK.

See SOLICITOR.

### PRINCIPAL AND SURETY.

See BOND.

### PRISONER.

See LORD CHANCELLOR.



## PRODUCTION OF DOCUMENTS.

1. Where it is charged by a bill that the Defendants have in their possession documents which relate to the matters aforesaid, that is, the Plaintiff's title, (amongst other things), it is not sufficient for the Defendants, with a view to excusing their production, simply to state their belief that such documents do not contain evidence of, or tend to shew, the Plaintiff's title; but they must, in distinct terms, negative the grounds on which the Plaintiff asks for their production. *The Attorney-General v. The Corporation of London*, 1

2. *L.*, resident at *Quebec*, brought an action of trover against *R.*, to recover the amount of certain insurance monies received by *R.* in respect of a ship that had been wrecked; whereupon *R.* filed his bill against *L.* and his partner, and the mortgagee of *L.*, to restrain proceedings in the action, on the alleged ground that the ship was the property of *L.* and his partner, who became indebted to *R.* in a large balance on a mutual account, in respect of which *R.* claimed to retain the monies so received by him by way of set-off. *L.*, in his answer to the bill, stated, that, in the first part of the schedule, he had set forth certain books and documents belonging to the firm of *L.* and his partner, and not to the Defendant *L.* alone, and in the joint possession of *L.* and his partner, but which partnership had since been dissolved. A motion by *R.*, for production for the usual purposes of those books and documents, was refused. *Reid v. Langlois*, 59

3. *L.*, in the same answer, also claimed, as privileged communications, certain "letters from the Defendant *L.* to *R. & B.*, his agents in *England*, to be communicated by *R. & B.* to Messrs. *W. & M.*, the legal advisers of the Defendant in *England*."—*Held*, that the Defendant

was not bound to produce the same for the Plaintiff's inspection. *Id.*

4. A bill was filed by a *cestui que trust* against the purchaser of real estate from trustees, to set aside the conveyance on the ground of inadequate consideration. The purchaser insisted that the consideration was sufficient, because the title was defective, but offered to reconvey the estate on repayment, and on payment of expenses in improvements and repairs. He admitted that he had possession of the title deeds:—*Held*, that he was bound to produce them. *Shallcross v. Weaver*, 231

## PROTECTOR OF SETTLEMENT.

See LUNACY, 2, 3.

## PURCHASE-MONEY FOR LAND TAKEN BY CORPORATION.

See RE-INVESTMENT ON REAL ESTATE.

## RAILWAY COMPANY.

1. The *Eastern Union Railway Company* was authorised by several Acts of Parliament to make railways from *Colchester* to *Ipswich*, *Ipswich* to *Bury St. Edmunds* and *Norwich*, and from *Ipswich* to *Harwich*, and, for those purposes, to raise monies by shares and loans, not exceeding certain sums in the whole. The same Company was also, by a distinct Act, authorised to purchase and complete the *Hadleigh Junction Railway*, and, for that purpose, by shares or loan, to raise a sum not exceeding 100,000*l.* In a suit brought by the proprietor of a scrip certificate for stock, forming part of the capital raised in pursuance of the Acts authorising the Company to purchase the *Hadleigh Junction Railway* and make the *Harwich* line,—charging that the Company was about to misapply such money in the construction of the *Norwich* line, and

seeking to restrain such misapplication,—the demurrers of the Company and the Directors, for want of equity, were overruled. *Bagshaw v. The Eastern Union Railway Company*, 201

2. Where a Company is authorised by Act of Parliament to raise monies for a specific purpose only, it is not competent to any majority of the shareholders of the Company to divert such monies to another purpose against the will of a single shareholder; nor could unanimity amongst the shareholders make such a diversion lawful. *Ib.*

3. Whether a Company, having powers to construct several branch and extension railways, and to raise certain distinct sums of money for such respective works, such monies being declared to be part of the general capital of the Company, may or may not lawfully apply monies in the execution of one undertaking, which they were empowered to raise for another,—*quære*. *Ib.*

4. The Company, in its corporate character, was properly made a Defendant to such a suit by some of the members. *Ib.*

5. The proprietor of a scrip certificate, whether registered or not, (such proprietor not being in default,) may sue on behalf of himself and all other proprietors of like certificates, and of the stock which they represent or into which they are convertible, where the proprietors of certificates and stock are very numerous; there being no incompatibility in the interest of the registered and unregistered proprietors to preclude the Plaintiff from representing both classes of persons. *Ib.*

6. The original subscriber of the sum represented by the scrip certificate, the vendor of the same to the Plaintiff, is not a necessary party to a suit, inasmuch as the contract between such original subscriber and the Company gave the former the right to

assign his interest and be discharged, and such interest was duly assigned by him to the Plaintiff, and the Plaintiff was accepted by the Company in his stead. *Ib.*

7. Contractors agreed to perform certain works for a Railway Company within a certain time, and were to be paid from time to time for the work certified by the Company's engineer to have been duly performed. In default, the Company were to be at liberty to take possession of the works, and of all the contractors' plant and materials. Some delay in performing the works was occasioned by the acts of the engineer, not repudiated by the Company, and the rate of proceeding with them was distinctly varied by him. The Company afterwards gave notice to the contractors that they were not proceeding to the satisfaction of the Company, and they soon afterwards took possession of the plant and materials. The contractors filed a bill, alleging that certificates had been unjustly withheld, and the payments had improperly fallen into arrear; and it prayed that accounts might be taken of what was due to them, and for an injunction to restrain the Company from taking the works and plant. A demurrer, for want of equity, was overruled. *Waring v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 239

8. A contractor agreed with a Railway Company to execute certain works, for which he was to be paid from time to time by instalments, and no works were to be considered as completed unless done to the satisfaction of the engineer of the Company, and certified by him. The contractor filed a bill, alleging that he had executed the work properly, and had performed his part of the contract, but that the engineer improperly and fraudulently withheld his certificates, and that he did so by the direction of

the Company. A demurrer to the bill was overruled. *M'Intosh v. The Great Western Railway Company*, 250

9. The *S. and B. R. Co.* opposed a bill brought into Parliament by the *L. and N. W. R. Co.*, seeking to authorise a lease to that Company of a scheme in process by the *S. U. R. Co.*; whereupon an agreement in writing was come to between the Companies, that, in consideration of the withdrawal of the opposition by the *S. and B. R. Co.*, an account should be kept of the profits received from the traffic on the lines *S. and B. R.* and *S. U. R.*, and that the profits to be received in respect of the traffic should be divided between them, in certain proportions. By reason of the withdrawal of the opposition, the bill was passed:—*Held*, that the agreement was not a fraud on Parliament, or illegal. *The Shrewsbury and Birmingham Railway Company v. The London and North Western Railway Company*, 257

10. *Held*, also, that an agreement entered into by two Companies, by which one of those Companies agreed that it would not prejudice, or, by an indirect and circuitous course interfere with, the traffic passing on the direct line of the other Company, was not illegal. *Ib.*

11. An Act of Parliament recited three other Acts, one only of which had relation to an agreement entered into between the Plaintiffs and Defendants. By the 1st sect., on the completion of the works of the three lines of railways, by the recited Acts authorised to be made, so as to be opened for public traffic, or at such other period as might be agreed upon, the *S. U. R. Co.* were empowered to grant to the *L. and N. W. R. Co.* a lease in perpetuity of the undertaking. By the 11th sect. of the same Act it was enacted, that, as each of the lines of railway should be completed, the same should be worked and used by the *L. and N. W. R. Co.*;

and, for the purposes of such working, the *L. and N. W. R. Co.* were to exercise the powers before given by the Act to the *S. U. R. Co.*, in relation to every such completed railway. Other sections of the Act spoke of the "*lease of the said railways*" and the "*making of such lease*."—*Held*, that, according to the true construction of the Act, there was no postponement of the rights of the parties to the benefit of the provisions of the lease, until the whole of the three lines had been completed. *Ib.*

12. A Railway Company gave notice of their intention to take land, and a claim was sent in, which was afterwards abandoned and repudiated by both parties. The Company then proceeded, under the 63th and 85th sects. of the Lands Clauses Consolidation Act, to take possession. The owner of the land might either apply for a mandamus to compel the Company to take steps to summon a jury, or might send in a claim, which, under the 85th sect., the Company must either pay, or summon a jury within twenty-one days; but a bill, treating the first notice as constituting a contract, and praying for the specific performance of it, was *held*, upon demurrer, not to be sustainable. *Adams v. The London and Blackwall Railway Company*, 285

13. Whether the mere fact of a Company giving notice of their intention to take lands, such notice not being followed up by any agreement between them and the owner, and no claim being sent in by the owner, gives the Court jurisdiction to compel specific performance of such a contract, although it fixes the lands which the Company are to take,—*quære*. *Ib.*

14. A Railway Company about to sever the Plaintiffs' land by their railroad, agreed to purchase the necessary portion of land, "subject to the making of such roads, ways, and

slips for cattle, as might be necessary." *Held*, that the Plaintiff was entitled to a specific performance, and to have such roads, ways, and slips for cattle as might be necessary and proper for convenient communication between the severed portions of the Plaintiff's land; and a reference was therefore directed, to ascertain what was necessary and proper. *Sanderson v. The Cockermouth and Workington Railway Company*, 327

15. Where land is taken by a Railway Company, not under their compulsory powers, but by private contract, the jurisdiction of the Court of Chancery to secure to the vendor the easements he contracted for, is not ousted by the provisions of the Railway Acts. *Ib.*

16. The Court of Chancery will, in proper cases, grant an injunction to restrain parties from applying to Parliament for a private Act, or an Act respecting property; but it will not do so merely upon the ground that such Act would interfere with existing rights, whether they exist by the tenure of property or by virtue of contract. *Heathcote v. The North Staffordshire Railway Company*, 332

17. A landowner withdrew his opposition to a bill before Parliament, on the faith of an agreement with the Railway Company, that they should in the next session of Parliament apply for an Act authorising the formation of a branch railway to certain works belonging to such landowner. The Company obtained an Act in the following session, but afterward gave notice of their intention to apply for another Act, authorising them to abandon that branch:—*Held*, that there was no ground for granting an injunction to restrain the Company from applying for such an Act. *Ib.*

18. An Act of Parliament, which authorised the transfer of a particular portion of a projected railway from one Railway Company to another, en-

acted, that if that portion of the railway was not completed within three years from such transfer, it should not be lawful for the Railway Company to pay any dividend until the whole should be completed. That portion was not completed within the three years:—*Held*, that the Company were prohibited from paying any dividend on any of their shares, and not merely upon the capital embarked in that particular portion of their undertaking. *Carlisle v. The South Eastern Railway Company*, 366

19. *Held*, also, that one shareholder might sue on behalf of himself and other shareholders to restrain the payment of any future dividend; and that, notwithstanding he had received interest on his shares since the expiration of the three years, he being then ignorant of the enactment in question. *Ib.*

20. *Held*, also, that the Plaintiff, being the holder of some shares of a particular class which were not entitled at present to participate in any dividend, was not entitled, on a bill so framed, to an injunction to restrain the payment of a dividend already declared, the other shareholders who were interested in those dividends not being parties to the record or represented. *Ib.*

21. Whether, in such a case, any adequate remedy exists, without making all the shareholders parties—*quære*. *Ib.*

22. Although the Court will interfere by injunction, in proper cases, to restrain a Company from constructing a small portion only of their works, with a view of abandoning the remainder, yet, where such an intention had been known to the shareholders, or they had had opportunity of knowing it many months before the filing of a bill to prevent such proceeding, and had made no application to the Court, such acquiescence on the part of the shareholders was held to have created

a counter-equity; and the Court refused to grant an injunction for that purpose. *Graham v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company*, 450

## RECEIVER PENDENTE LITE.

The Court will not grant a receiver pending litigation in the Ecclesiastical Court for probate of a will, unless it is shewn that the property is in such a position that it requires protection in the meantime, and that it might be lost or in danger if there were no one to receive it. *Whitworth v. Whyddon*, 445

## REFERENCE.

After a reference had been directed to the Master to inquire which of two suits ought to proceed for the benefit of an infant, a demurrer was put in to one of the bills, and it was amended:—*Held*, that the Master ought, notwithstanding, to proceed with the reference. *Goodale v. Gauthorn*, 193

## REINVESTMENT ON REAL ESTATE.

1. Where the purchase-money for real estate taken by a Corporation is directed to be reinvested in real estate, and all the reasonable costs attending such purchase are to be paid by the Corporation, there is no limit to the number of purchases, or to the costs which are to be allowed, except there is an unreasonable exercise of the direction to invest, so as to occasion vexatious and unnecessary expense. *Jones v. Lewis*, 406

2. Where a sum of 141,660*l.* had been paid for the purchase of real estate by a Corporation, the expenses of a third and fourth reinvestment were thrown upon the Corporation. *Id.*

## REVERSIONARY INTEREST.

*See* VENDOR AND PURCHASER, 3.

## STAYING PROCEEDINGS.

## SOLICITOR.

*See* AGREEMENT.

VENDOR AND PURCHASER, 1, 2.

An attorney, to whom a clerk was articulated, died before the articles expired:—*Held*, that the Court had jurisdiction to order part of the premium paid to the attorney to be repaid out of his assets; and that, although he had covenanted to instruct the clerk "or cause him to be instructed," and his surviving partner had agreed with his executors to take the clerk for the remainder of his articles. *Hirst v. Tolson*, 359

## SPECIFIC PERFORMANCE.

*See* RAILWAY COMPANY, 12, 13, 14, 15.

## STATUTE OF FRAUDS.

*See* HUSBAND AND WIFE, 2.

PARTNERSHIP IN LAND.

## STATUTES.

21 Jac. I. c. 14.—*See* CROWN.

48 Geo. III. c. 123.—*See* LORD CHANCELLOR.

3 & 4 Will. IV. c. 74.—*See* LUNACY, 2.

5 & 6 Vict. c. 100.—*See* DRAINAGE.

10 & 11 Vict. c. 96.—*See* TRUSTEES RELIEF ACT.

## STAYING PROCEEDINGS.

By a decree at the *Rolls*, the Plaintiff had been declared entitled to real estate which had been formerly conveyed by him to some of the Defendants under circumstances which induced the Court to set aside the conveyance. None of the parties wished to interfere with some sales which had been since made of parts of the estate, but the amount of the purchase-money for them was ordered to be paid to the Plaintiff. The decision was appealed from, and upon motion to stay proceedings pending the appeal, upon payment into Court of the amount of the purchase-money, the

Court made the order, not on account of the alleged poverty of the Plaintiff, but on the ground that the substitution of the money for the estate was an accident arising from the sale of part of the property, and that the Plaintiff would be in the same position as if none of the estates had been sold. *Sturge v. Sturge*, 469

## TRUSTEE.

See FRAUD.

## VENDOR AND PURCHASER, 1, 2.

Where one *cestui que trust* procures the trust-money to be laid out improperly, and part of it is consequently lost, the other *cestuis que trust* are entitled, as against him, in a suit properly constituted for that purpose, to have their shares of the trust-money made good out of his share of that which is ultimately recovered. But if the bill prays relief against the trustees only, the liability of the share of that *cestui que trust* cannot be enforced against him. *Phillipson v. Gatty*, 459

## TRUSTEES RELIEF ACT.

1. Where a fund has been brought into Court under the Trustees Relief Act (10 & 11 Vict. c. 96), and a deed under which a party claims the money is held invalid, the Court cannot, on petition, order it to be set aside—*Semble. In re Bloye's Trust*, 140

2. In such a case the Court will preface an order dismissing the petition with a declaration that it considers the deed to be invalid. *Ib.*

3. Observations upon the Trustees Relief Act. *Ib.*

4. Where trustees who pay money into Court under the Act, deduct a sum for their costs, the propriety of that course can only be questioned by filing a bill. *Ib.*

## TWO SUITS FOR SAME OBJECT.

See REFERENCE.

## VENDOR AND PURCHASER.

See FRAUD.

1. Where the sale of property takes place under a power contained in an annuity deed, the annuitant is a trustee for the purpose of the sale, and neither he nor his attorney or agent is qualified to become the purchaser. *In re Bloye's Trust*, 140

2. An annuitant with a power of sale sold property charged with the annuity, by auction. An objection to the title was afterwards taken, and the contract abandoned. The solicitor for the vendor afterwards took an assignment to a trustee, for himself, from the personal representative of the grantor, who did not employ any other solicitor, at the price which it brought at the auction, but without communicating the circumstances as to the title:—*Held*, that such a purchase could not be sustained. *Ib.*

3. In the case of a bill filed to set aside the sale of a reversionary interest in a freehold estate, dependant on the tenant for life dying without issue, he being at the time of the sale in his 57th year, and his wife in her 54th year, and there never having been any issue of the marriage except a still born child, many years previously to the time of the sale, a reference was directed to the Master to ascertain the value of the reversionary interest at the time of the sale. *Boothby v. Boothby*, 214

## WILL.

See ELECTION.

ISSUE DEVISEAVIT VEL NON.  
LEGACY.

1. *W. S.* by will gave all his real estates unto and to the use of *W. T.*, his heirs and assigns, upon trust, out of the rents to pay to *M. S.*, during her life, an annuity of 150*l.* and to apply the surplus rents, after payment of the annuity and such other charges and expenses as thereafter men-

tioned, unto the testator's daughter *C. N.*, wife of *B. N.*, during the life of *M. S.*; and after the decease of *M. S.*, the testator directed that the estates should remain unto *W. T.*, his heirs and assigns, to the use of *C. N.* for her life, with remainder to the use of *W. T.*, his heirs and assigns, during *C. N.*'s life, in trust to preserve &c.; and after the decease of *C. N.*, to the use of *B. N.* for life, with remainder to the use of *W. T.*, his heirs and assigns, during the life of *B. N.*, in trust &c.; and after the decease of *B. N.*, in case he should survive *C. N.*, to the use of all the children of the body of *C. N.* to be begotten, as tenants in common; and there was a proviso, that, in case *B. N.* and *C.* his wife, or the survivor, should desire a sale of the estates, it should be lawful for *W. T.*; his heirs or assigns, to sell the same, with the consent of *B. N.* and *C.* his wife, and sign and give receipts for the purchase-moneys, which were to be effectual discharges to the purchasers. The will contained a direction to lay out the sale monies in the purchase of other hereditaments, or upon good security at interest, in the name of *W. T.*; and the hereditaments to be purchased were directed to be conveyed to *W. T.*, his heirs and assigns, to the uses before mentioned; the interest of the sale monies was directed to be paid to the parties entitled to the rents, and the principal money, in case of no purchase being made, was directed to be divided amongst *C. N.*'s children equally, at twenty-one. After the death of *W. T.*, *G. T.*, the sole devisee of his estates, subject to a gross payment of 50*l.* thereout, joined with *B. N.* and

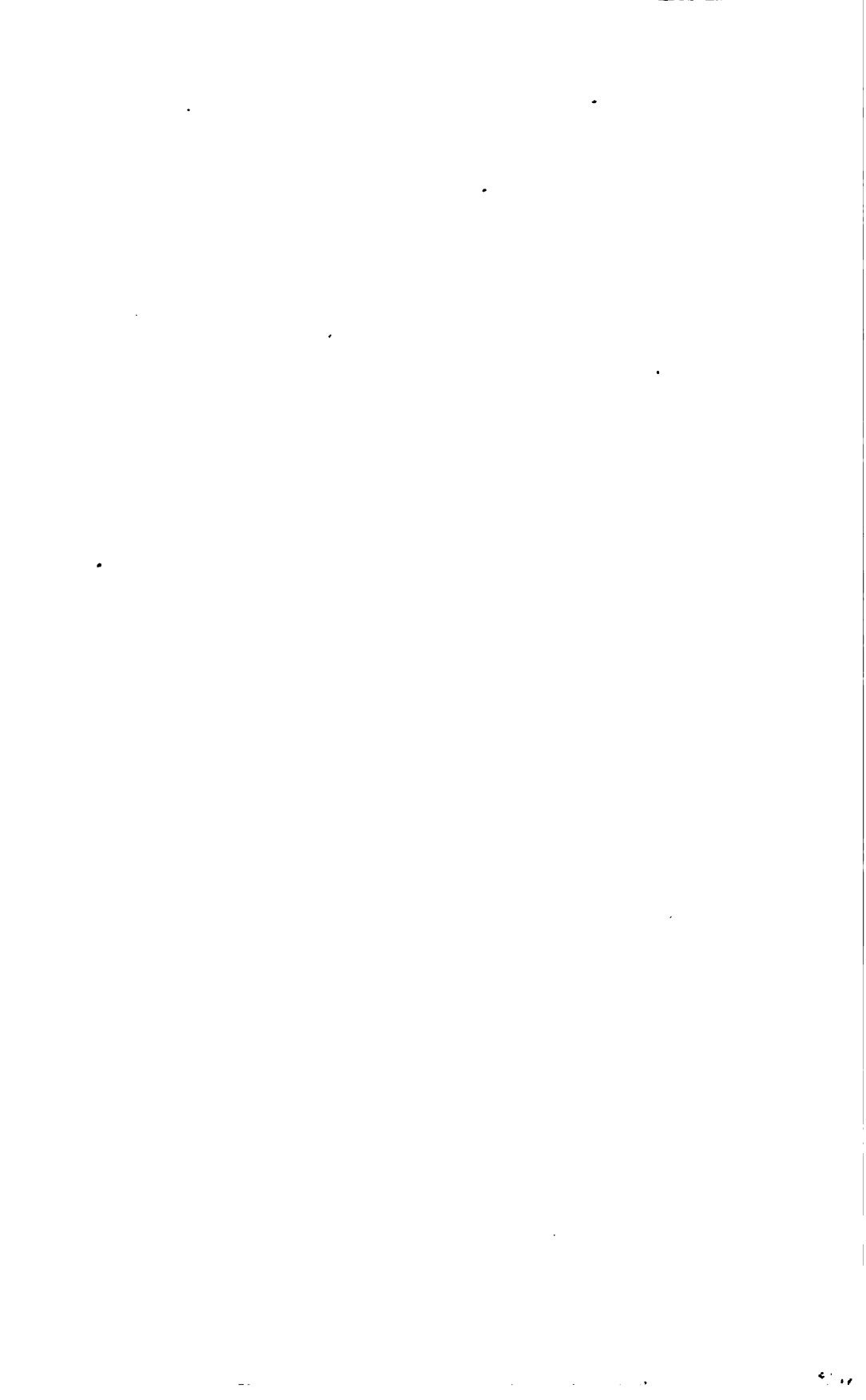
*C.* his wife in the sale and conveyance of *W. S.*'s estates to a purchaser thereof, and *B. N.* was allowed to receive the purchase-money, and gave to *G. T.* a bond of indemnity to save her harmless in respect of such receipt. *C. N.* survived her husband *B. N.* several years, and also *G. T.*, who by her will appointed *C. S.* her executrix. On bill filed by the executors of *C. N.*, and the assignees of her life-interest, against *C. S.* and the other parties interested in the purchase-moneys:—*Held*, that the trust estates under the will of *W. S.* were vested in *W. T.*  
*Rackham v. Siddall*, 44

2. Where the first expressions in a will are ambiguous and capable of two constructions, the other parts of the will, dealing with the whole property under any circumstances which might arise, are very important for consideration in aid of the construction to be put on those expressions, and determining the intention of the testator.  
*Lassence v. Tierney*, 115

3. A testator bequeathed to his wife absolutely 100*l.*, his household furniture, &c., and then bequeathed to her the interest of monies invested by him in certain Loan Societies, and all his other property, during her life. He afterwards bequeathed all monies belonging to him in a Friendly Society, and in all other Societies, to his wife absolutely:—*Held*, that the expression "all other Societies," meant Societies *ejusdem generis* with that which had been just mentioned; and that, as to the money payable by the Loan Societies, the widow took a life interest only in them. *Marks v. Solomons*, 323







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